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OCTOBER TERM, 1950.

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No. 535

ARKANSAS POWER & LIGHT COMPANY

AND

MIDDLE SOUTH UTILITIES, INC.,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

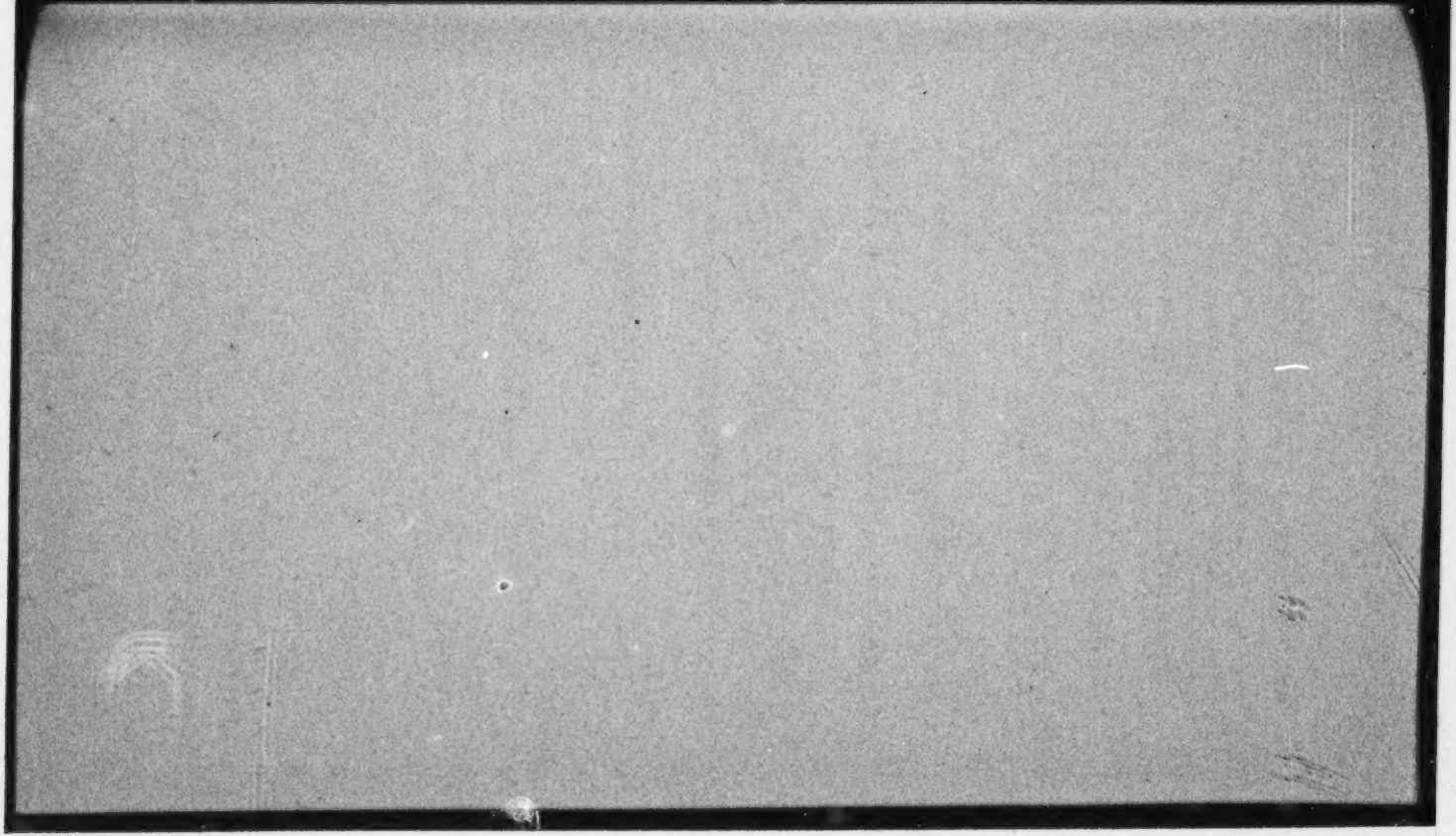
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

P. A. LASLEY,
512 Pyramid Building,
Little Rock, Arkansas.
Counsel for Petitioner,
Arkansas Power & Light Company.

A. J. G. PRIEST,
SIDMAN I. BARBER,
BERNAL SEAMSTER,
Two Rector Street,
New York 6, New York.

GORDON E. YOUNG,
Simmons National Building,
Pine Bluff, Arkansas.
Of Counsel.

HARRY A. POTH, JR.,
910 17th Street N. W.,
Washington, D. C.
Counsel for both Petitioners.



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In the

Supreme Court of the United States

October Term, 1950.

No. .....

ARKANSAS POWER & LIGHT COMPANY

and

MIDDLE SOUTH UTILITIES, INC.,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Arkansas Power & Light Company and Middle South Utilities, Inc. pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the judgment of that Court entered in the above-entitled cause on November 9, 1950, affirming an order of the Federal Power Commission, dated February

15, 1949, and an order of that Commission denying Petitioners' Application for Rehearing, dated March 30, 1949.

Opinions Below

The opinion of the Court of Appeals for the District of Columbia Circuit was entered on November 9, 1950, and the order of that Court denying rehearing and modifying its original opinion was entered December 19, 1950. The opinion and order are not yet reported, but appear at R. 2029, 2051.

The opinion and order of the Federal Power Commission and the order denying the Petitioners' Application for Rehearing have not been officially reported. The opinion and order of the Commission appear at R. 253-298.

Jurisdictional Statement

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

Statutes Involved

The relevant portions of the Federal Power Act are set forth in Appendix A, *infra*, pages 21-25. The relevant portions of the Arkansas Utility Act are set forth in Appendix B, *infra*, pages 26-32.

Summary Statement of the Case

On May 21, 1949, the Arkansas Power & Light Company (the "Company") and Middle South Utilities, Inc.[1] ("Middle South") filed in the United States Court of Appeals for the District of Columbia Circuit their petition for review of an order of the Federal Power Commission ("Federal Commission") issued February 15, 1949, in which the Federal Commission directed adjustments to be made in

[1] Middle South Utilities, Inc. is the owner of all of the common stock of the Company, previously held by Electric Power & Light Corporation, one of the original petitioners herein (R., 1), and is the successor in interest to Electric Power & Light Corporation pursuant to a Plan approved by the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935.

the basic corporate accounts[2] of the Company in conflict with and contrary to determinations made by the Arkansas Public Service Commission ("State Commission").

The Company is an Arkansas corporation and predominantly a local enterprise. Less than one per cent of its electric property is used exclusively to serve customers at wholesale for resale with some interstate electric energy. However, because its transmission facilities do carry interstate energy and it has hydroelectric projects licensed by the Federal Commission, the Company is a "licensee" and a "public utility" under the Federal Power Act.

The Arkansas State Commission has comprehensive regulatory jurisdiction over all public utilities doing business in Arkansas, including authority to supervise and control the issuance of securities, establish a uniform system of accounts, prescribe the manner of keeping such accounts, determine the rates from which the Company derives more than 90% of its electric revenue and other important functions.[3]

On June 24, 1944, the State Commission, in a combination accounting and rate proceeding, entered an order (R. 1751-1835) which (a) reclassified the Company's plant account, (b) determined the actual arm's-length cost of its properties, (c) segregated that cost between original cost (Account 100.1) and the excess over original cost (Account 100.5), and (d) directed (or has since approved) the writing out of plant account of more than $12,000,000 representing re-

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[2] These accounts have been variously referred to in the order of the State Commission (Ex. 5, R., pp. 1754-55) and in the order under review as the "official, corporate accounts", "fundamental and basic corporate accounts", "basic corporate accounts" and "general corporate accounts" (R., p. 275). There has been clear recognition of the fact that the Company can have, and has, only one such set of accounts for corporate purposes and that, as such, they must be distinguished from memoranda or pro forma accounts. This primary set of accounts will be referred to as the "basic corporate accounts," i.e., the accounts which constitute the Company's official record of stewardship and upon which its reports to stockholders and the public are based.

[3] See Appendix B, pp. 26-32.

corded cost in excess of arm's-length cost. An amount of $6,947,058.92 paid for the acquisition of local electric properties was ordered to be recorded in Account 100.5 as an inseparable part of the Company's prudent investment in forming its new, more efficient and more economical System, *representing value (not recouped through earnings) at the time when expended and at the time of the Commission's order.* The State Commission, in the same order, fixed the Company's rate base (measuring it by the Company's prudent investment in electric properties) and determined its allowable earnings on a basis which included the amount in Account 100.5 with as full earning value as any other asset.[4] The Company had issued, at the time of the Federal Commission hearing, more than $60,000,000 of securities (R. 1835, 1856-1858) all authorized by the State Commission and predicated upon the prudent investment rate base allowed by the State Commission. In 1942 the Company disposed of its local water and ice properties and realized $2,968,563.86 less than their recorded cost. This amount was charged (with State Commission approval) to a composite reserve for "property retirement." (R. 1775-1776).

After the entry of the State Commission's order, the Federal Commission required the Company to show cause why its accounts should not be altered to conform with recommendations of the Federal Commission's staff. The Company then initiated a proceeding in the District Court of the United States for the District of Columbia for a declaratory judgment determining which Commission had jurisdiction over the Company's basic corporate accounts. The order of that court dismissing the complaint was reversed by the United States Court of Appeals for the District of Columbia Circuit upon the ground that a justiciable controversy was presented. (*Arkansas Power & Light Company* v. *Federal Power Commission*, 81 App. Div. D. C. 178, 156 F. 2d 821 (1946)). In turn, this Court reversed

[4] Subsequent adjustments approved by the State Commission have somewhat reduced the amount recorded in Account 100.5.

the Court of Appeals and directed that the case be dismissed solely because plaintiff had not exhausted its administrative remedy (330 U. S. 802 (1947)). That remedy now *has* been fully exhausted.

The dilemma with which the Company was confronted was well stated by the court below in its original opinion in this proceeding (156 F. 2d at p. 823), as follows:

> "But when a regulatory commission asserts the right to command that an item which another commission, also claiming jurisdiction, has treated as a valuable asset, be charged to surplus or amortized through charges to earnings, the commission which asserts such right to command unquestionably is saying that accounts kept in response to its orders must be, not mere memoranda, but the official corporate records. Such action goes beyond a claim of authority to make bookkeeping or accounting requirements, and touches actual property rights. In such circumstances, a utility should be able to learn from a declaratory judgment *which commission has exclusive jurisdiction.*" (Emphasis supplied).

The opinion, findings and order under review here were issued by the Federal Commission on February 15, 1949. Of the amount recorded in Account 100.5 under orders of the State Commission, then reduced to $6,210,240.04 (which the State Commission had determined to be an investment of continuing value for local service), the Federal Commission (a) classified $1,033,626.13 as a write-up not representing valid cost and directed that it be transferred from Account 100.5 to Account 107, Electric Plant Adjustments, and immediately charged off and (b) ordered that the remaining $5,176,613.91 be written off over a period of twelve years by equal charges against the annual earnings allowed the Company by the State Commission (thus reducing such annual earnings, since the Federal Commission could not provide revenues therefor). The Federal Commission also ordered that the amount charged to reserve upon disposition of the water and ice properties be limited to $601,678

and directed that the Company increase its depreciation reserve in the amount of $2,366,885.86 by crediting that amount to the reserve and charging it to earned or capital surplus. The Federal Commission's order specifically *provides that all of its required entries be made in the basic corporate accounts of the Company* and that the Company shall correct such accounts accordingly. (R. 297-298).

There is no controversy whatsoever in this case regarding the cost of licensed projects. The State Commission has conceded that the accounting jurisdiction of the Federal Commission is superior with respect to the determination of such costs and has approved adjustments prescribed by the Federal Commission.

The Court of Appeals (Judge Miller dissenting) affirmed the order of the Federal Commission. In its first decision, the court stated that the Company had abandoned on oral argument "the contention in its brief that the adjustments ordered by the Federal Commission were arbitrary and capricious." A petition for rehearing was filed in which counsel for Petitioners vigorously asserted that they earnestly believed they had pressed the point that the Federal Commission's order was arbitrary because of its disregard of the conclusive determinations of the State Commission as to the usefulness and value of the disputed investments for local service (R. 2032). In its order overruling the motion for rehearing, the court amended its opinion to read that the Company abandoned "the contention in its brief that the adjustments ordered by the Federal Commission were arbitrary and capricious *apart from their inconsistency with the order of the Arkansas Commission.*" (R. 2051).

Questions Presented

The questions presented are:

(1) Whether, in the circumstances here presented, the Federal Commission or the State Commission may exercise

dominant control over the basic corporate accounts of a primarily intrastate electric utility company.

(2) Whether the Federal Commission's accounting jurisdiction, if considered dominant, is so absolute that it (a) may review and reverse the determination of a State Commission as to the cost, and the value and usefulness to the State economy, of assets used in local service subject solely to State regulation, and (b) may require a large part of such assets to be written off upon the ground that they lack value for Federal purposes, regardless of their value for local service subject solely to State regulation.

(3) Whether the Federal Commission has such complete authority over the basic corporate accounts of a predominantly intrastate electric utility company that it may require a bona fide investment to be written off against net earnings, despite the fact that such investment has been found by a State Commission to represent arm's-length cost and to be used and useful in rendering local service and has been included by such State Commission in a prudent investment rate base from which more than 90% of the company's earnings are derived.

(4) Whether, in the circumstances here presented, the Federal Commission may require a public utility company's basic corporate accounts (upon which sales of securities must be predicated and reports to stockholders and the public must be based) to reflect information not in accordance with actualities and which therefore misleads rather than informs.

(5) Whether the Federal Commission's accounting authority is such that, in the circumstances here presented, it may require a public utility company to reverse accounting entries affecting such a company's depreciation or retirement reserve, even though such entries were made with State Commission approval.

(6) Whether the judgment below deprives Middle South (the holder of all the common stock of the Company) of its

property without due process of law in violation of the Fifth Amendment.

(7) Whether the Court of Appeals erred in failing to reconcile Federal and State jurisdictional claims of accounting authority, thus ignoring the recognized rule that State regulatory powers are not superseded by Federal powers conferred by Congressional enactment unless the two powers cannot be reconciled.

(8) Whether the Court of Appeals failed to meet the issues in the case, particularly in its erroneous assumption that the jurisdictional claims of the two commissions were determined by the cited decisions respecting licensed project accounts.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

I.

The Court of Appeals has decided the Federal questions in a way probably in conflict with the Federal Power Act and with applicable decisions of this Court.

The Congress did not give the Federal Commission the exclusive authority apparently affirmed by the judgment below.

The Federal Commission order, affirmed below, is in conflict with the provisions of the Federal Power Act, particularly Section 301(a) (see Appendix A, pp. 22-24), and the most recent decision of this Court construing the effect of Parts II and III of the Act, *Connecticut Light & Power Company* v. *Federal Power Commission*, 324 U. S. 515 (1945).

The accounting powers of the Federal Commission (Section 301, Federal Power Act, 16 U. S. C. Sec. 825) are not unlimited. The Federal Commission is authorized only to prescribe such accounts and records as are "necessary or appropriate for purposes of the administration of this Act * * *", and even this authority is subject to the express condition:

> "*Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State."

The Act does not deprive the States of any of their local regulatory powers. The repeated assertions of the proponents of this legislation establish a clear intent to supplement and assist, rather than encroach upon, State regulation.

The policy of the Act is declared in Section 201(a) (16 U. S. C. A. Sec. 824(a)):

> "* * * such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States."

The intended supplementary nature of this Federal regulation was recognized in *Connecticut Light & Power Company* v. *Federal Power Commission*, 324 U. S. 515, 525-526 (1945), where Mr. Justice Jackson, speaking for the Court, said:

> "Legislative history is illuminating as to the congressional purpose in putting these provisions into the Act. As frequently is the case, this original bill was drafted by the counsel and aides of the agency concerned. In its support Commissioner Seavey of the Federal Power Commission said to the House Committee, 'The new title II of the act is designed to secure coordination on a regional scale of the Nation's power resources and to fill the gap in the present State regulation of electric utilities. It is conceived entirely as a supplement to, and not a substitute for, State regulation.' Progress of the bill through various stages shows constant purpose to protect rather than to supervise authority of the states. In reporting a revised bill to the Senate the Committee on Interstate Commerce said, 'Subsection (a) . . . declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers,

but not to impair or diminish the powers of any State commission.' * * *"

This Court has held that it is not the object of a uniform system of accounts to permit a commission to regulate the affairs of a company not within its jurisdiction, *Interstate Commerce Commission* v. *Goodrich Transit Company*, 224 U. S. 194 (1912). Nor can the application of such a system of accounts justify the seizing of financial control when such financial control is expressly withheld by the terms of the legislation, in this instance by Section 204(f) of the Federal Power Act, which withdraws jurisdiction over the issuance of securities (and therefore over capital structure, etc.) from the Federal Commission and vests it in the State Commission. The Federal Commission found (R. 279) that it must have jurisdiction over "the general books which form the basis of financial statements, the sale of securities and informing the public generally regarding the financial affairs of the Company" and the court below must have proceeded (without an express holding) on the erroneous theory that this finding by the Federal Power Commission justified its arrogation of financial control over the Company.

The unlimited and unrestricted accounting authority here sought to be exercised by the Federal Commission has not been expressly conferred upon that Commission by the Congress and its attempted exercise clearly is at variance with decisions of this Court. The applicable rule is stated by Mr. Justice Jackson in the *Connecticut Light & Power Company* case:

> "* * * We have said, and it is applicable to this case, that 'Where a Federal agency is authorized to invoke an overriding Federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of Federal authority to act should appear affirmatively and not rest on inference alone.' *Yonkers* v. *United States*, 320 U. S. 685, 692 * *; *Florida* v. *United States*, 282 U. S. 194,

211-12 * *; *cf. Palmer* v. *Massachusetts*, 308 U. S. 69, 84 * *; *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351 * *" (324 U. S. 515, 532). See also *Illinois Central R. R. Co.* v. *Public Utilities Commission*, 245 U. S. 493, 510 (1918).

Congress patently did not intend to supersede or suspend State regulatory powers over the basic corporate accounts of public utilities subject to State jurisdiction. Apposite in this connection is the language of Mr. Justice Frankfurter in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 521 (1942):

> "We cannot, therefore, indulge in the loose assumption that when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated, are only local."

Where Congress has left in the State the power to regulate a company's local affairs, the accounting power of the Federal agency *as to such local matters* is limited to purposes of information. The only accounting authority of the Federal Commission in such case is to require information in order that it may "properly regulate such matters as are really within its jurisdiction."[5]

The Court of Appeals' opinion affirms the Federal Commission's finding that its accounting authority is completely overriding and makes no effort to integrate the accounting

[5] *Interstate Commerce Commission* v. *Goodrich Transit Co.*, *supra*, at p. 211; cf. *Nebbia* v. *New York*, 291 U. S. 502, 525 (1934).

powers of the two Commissions in conformity with their substantive regulatory powers.

The Court of Appeals' opinion completely ignores the recognized rule that State regulatory powers are not superseded or suspended by Federal enactments unless the State and Federal powers cannot be reconciled, *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202 (1944); *Public Utilities Comm.* v. *United Fuel Gas Company*, 317 U. S. 456 (1943). The State was denied the right to exercise its authority over the basic corporate accounts of a predominantly local service company, the court below apparently having failed to consider (in any event, it did not pass upon) the integration and reconciliation of State and Federal accounting powers which its opinion should have required.

The State Commission's accounting determinations, made four and one-half years prior to the entry of the Federal Commission's order here under review, established the continuing basis for (1) the regulation of local consumer rates from which the Company derives more than 90% of its electric revenue, and (2) the approval of the issuance and sale of securities by which the Company obtains the capital for necessary expansion and growth. And these determinations must be accredited by the Federal Commission.

The Company's basic corporate accounts should represent the actualities of its business, be a genuine record of stewardship and provide the basis upon which its true financial condition is reported. The accounting powers of the two commissions *can* be integrated in accordance with Congressional intent if the accounts reflect (1) the jurisdiction of the Federal Commission to the extent of Federal substantive regulation of licensed projects and facilities used exclusively in the transmission and sale of energy sold at wholesale for resale, and (2) the jurisdiction of the State Commission to the extent of State substantive regulation of intrastate sales and the issuance of securities.

The decision below, however, erroneously excludes the State Commission from the exercise of its proper authority by affirming the Federal Commission's order to amortize or charge out of the basic corporate accounts an investment in assets determined by the State Commission (1) to be used and useful in supplying local service and of local social and economic benefit, and (2) to be part of a local rate base measured by prudent investment, and thus having an earning status fully justified as to both cost and value.

The decision below conflicts with the statutes of the State of Arkansas (Act No. 324 of the Acts of the General Assembly of the State of Arkansas of 1935; Act No. 40 of the Acts of the General Assembly of the State of Arkansas of 1945; see Appendix B, pp. 26-32) and the decisions of the highest court of Arkansas, *Department of Public Utilities* v. *Arkansas Louisiana Gas Co.*, 200 Ark. 983, 142 S. W. 2d 213 (1940) and of this Court, *Arkansas Corporation Commission* v. *Thompson*, 313 U. S. 132 (1941), establishing the conclusive character of the determinations of a State tribunal in such circumstances as these.

The opinion of the Court of Appeals sustains the arbitrary writing off of assets purchased at arm's-length and established as true increments of value and not fictitious or paper increments.

The Federal order affirmed by the Court of Appeals is unreasonable, arbitrary and capricious and in conflict with decisions of this Court: *American Tel. & Tel. Co.* v. *United States*, 299 U. S. 232 (1936); *Nebbia* v. *New York*, 291 U. S. 502 (1934); *United States* v. *New York Telephone Company*, 326 U. S. 638 (1946). The Federal Commission exceeds its authority when it assumes to review and revise the State Commission's determinations of the nature, character, service usefulness and value of the Company's property for local (intrastate) purposes and to require that its basic corporate accounts be altered to conform to Federal determinations—an abuse of power sustained by the decision of the court below.

The Court of Appeals failed to apply the rule announced by this Court in *American Tel. & Tel. Co.* v. *United States, supra*, that under such a system of accounts as that here considered only such amount could be written off as appeared "to be a fictitious or paper increment", and not "a true increment of value".

Although the Federal Commission has asserted that it did not consider $1,033,626.13 of the amount recorded in Account 100.5 under orders of the State to represent a valid cost to the Arkansas Company, it *has* recognized the remaining $5,176,613.91 in Account 100.5 as representing valid arm's-length cost. The public utility service of the Company is primarily local and the Federal Commission, being without authority in law to review or revise the determination of the State that the amount recorded in Account 100.5 represented assets of continuing full value for State purposes, cannot treat that amount as a fictitious or paper increment or lawfully find that it is not a true increment of value.

The Federal Commission cannot exercise any substantial control over the rates and earnings of the Company and that Commission must recognize the ineluctable fact that the asset in question has full earning value in the Company's rate base. *Central States Electric Co.* v. *Muscatine*, 324 U. S. 138 (1945). The opinion below, therefore, requires the reflection on the books of the Company of a loss which has not been actually suffered, and thus directly ignores the applicable and controlling decisions of this Court.

Furthermore, the effect of the opinion is to transfer a part of the Company's earnings to an account where they are not available for dividends, thus depriving Middle South not only of earnings allowed by State law but of the right to have these earnings reflected as such in the

Company's basic corporate accounts.[6] The confiscation effected by this appropriation of the stockholder's assets makes no provision for return of his investment and is in violation of the due process guaranteed by the Fifth Amendment.

II.

The Court of Appeals has decided important questions of Federal law which have not been, but should be, settled by this Court.

The issues presented are of prime importance in the law of conflicts between Federal and State authority. The Federal Commission is attempting to overrule and supersede the determinations of a State regulatory body which, within its appropriate jurisdiction, has already established the Company's basic corporate accounts and has adjusted them to factual bases as to matters particularly within its own competence.

The original and unique nature of this very proceeding was recognized by the Court of Appeals in *Arkansas Power & Light Co.* v. *Federal Power Comm'n*, *supra*, 156 F. 2d 821, at 823, in the following language:

> "The confusion as to the issues which is apparent in the briefs filed with us should be dispelled by the realization that a public utility cannot keep more than one set of actual, official corporate accounts. Neither can any other corporation, for that matter. There must always be an official recording of figures to represent the actualities of the business, to constitute the genuine record of stewardship, the basis upon which representations are made as to the real results of the utility's operations and its true financial condition in reports to stockholders and to the public, and in finan-

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[6] Cf. *American Power & Light Company* v. *Securities and Exchange Commission*, 325 U. S. 385, 388 (1945), which recognizes that stockholders have a substantial financial interest distinct from their corporation and that this interest is adversely affected by an order transferring an item from surplus to another account where it is not available for dividends.

cial statements to be submitted to prospective investors or creditors."

The issues are jurisdictional and legal rather than mere matters of bookkeeping. The Federal Commission may not exceed its statutory authority in exercising its accounting jurisdiction and may not act arbitrarily or capriciously or abuse its discretion. The Federal Commission overreaches its authority and abuses its discretion when it assumes to *review* and *revise* the State Commission's determination of benefits and values for State purposes and to compel State subservience. No other construction can be placed upon the Federal Commission's order.

The amount classified by the State Commission in Account 100.5 was determined by it to be of value to the State's economy and for State regulatory purposes:

> "Since this excess of investment over original cost was prudently made, has resulted in public benefits, and has not been recouped by the investors, and today represents existing and functioning value, the Department finds that it would be economically unsound and morally wrong to exclude the arm's-length excess over original cost from the rate base." (R., 1803-1804).

The Federal Commission ordered, however:

> "... our accounting rules and regulations and our order in this case run to the fundamental or basic corporate books and records of the companies subject thereto. We must, necessarily, in order to achieve the purposes of the Act, require that the accounts kept pursuant to our requirements be the fundamental or basic corporate accounts and not mere memorandum accounts set up for that purpose." (R., 283-284)

III.

The decision of the Court below fails to meet the issues raised in this case.

Both Commissions claim exclusive jurisdiction to dictate entries in the Company's basic corporate accounts, except

in so far as they relate to costs of licensed projects, over which the State concedes paramount Federal control. The Federal Commission, unlike the State Commission, does not limit its assertion of power to matters peculiarly within its own regulatory competence, but claims complete, inclusive and overriding accounting jurisdiction.

Thus each Commission has insisted, within the area of conflict, that it can require the Company to keep, according to its dictates, not just a set of memorandum accounts in conformity with its system of accounts and for its information, but the Company's basic corporate accounts.

The statement of the court below, "if the State in the proper performance of its duties, wishes to require the keeping of a separate set of books no doubt it can do so" (R. 2030) does not resolve the irreconcilable conflict presented here. The basic corporate accounts are fundamental and they are also singular in the sense that only one set of such accounts can be maintained.

The issue regarding accounts presented by this case is sharply distinguishable from the cases cited in the opinion below, *Alabama Power Co.* v. *Federal Power Comm'n*, 75 U. S. App. D. C. 315, 128 F. 2d 280 (D. C. Cir. 1942), and 134 F. 2d 602 (C. A. 5th 1943); *Hartford Electric Light Co.* v. *Federal Power Comm'n*, 131 F. 2d 953 (C A. 2d 1942); *Northwestern Electric Co.* v. *Federal Power Comm'n*, 125 F. 2d 882 (C. A. 9th 1942), and 134 F. 2d 740 (C. A. 9th 1943), affd. 321 U. S. 119, 88 L. ed. 596 (1944); *Pacific Power & Light Co.* v. *Federal Power Comm'n*, 141 F. 2d 602 (C. A. 9th 1944); *Louisville Gas & Electric Co.* v. *Federal Power Commission*, 129 F. 2d 126 (C. A. 6th 1942); and, *Northern States Power Co.* v. *Federal Power Commission*, 118 F. 2d 141 (C. A. 7th 1941).

The *Alabama Power Company, Louisville Gas and Electric Company* and *Northern States Power Company* cases concerned only the review of a Federal Commission order determining the costs of licensed projects. The issue in

Hartford Electric Light Co. v. *Federal Power Commission* was whether the Company was a "public utility" under the Federal Act and involved no conflict with a State order. The *Northwestern Electric Company* case was to review orders based upon a report made jointly by the State and Federal Commissions and the State Commissions filed *amicus curiae* briefs in support of the Federal Commission's contentions. *Pacific Power & Light Co.* v. *Federal Power Commission* was concerned only with the substantial nature of the evidence supporting a Commission accounting order and no State versus Federal conflict was presented.

The basic difference between this proceeding and the previous cases is recognized in *Arkansas Power & Light Co.* v. *Federal Power Comm'n, supra,* 156 F. 2d at pp. 822-823:

> "This case is not like those in which the courts, including the Supreme Court, have permitted two commissions, each having authority in the premises, to require a utility company to keep different sets of accounts, one to accord with the requirements of one commission, and another to meet the requirements of the other commission. For those cases do not deal with a conflict between jurisdictions over the sole right to prescribe official accounting methods, and go no further than to point out the right of a second commission to demand memorandum accounts to suit its purposes, which may differ from the accounts required by another commission which also has authority in the premises."

This extraordinary conflict arising out of two separate trials (one State and one Federal) involving identical issues of controverted facts cannot be finally resolved until the head-on disparity between the decisions of the two commissions is reconciled.

Further, the court below appears to have proceeded upon the theory that the State Commission opinion, findings and order here in evidence constituted nothing more than an assertion of conflicting authority and had no evidentiary value. In so doing it misconstrued or failed to apply the

holding of this Court in *Arkansas Corporation Commission* v. *Thompson, supra*, that adjudications of a quasi-judicial agency of the State must be recognized and given effect as to determinations of facts solely within the jurisdiction and competence of the State.

IV.

The Opinion of the Court below erroneously affirms the Federal Commission's reversal of entries in the Company's depreciation account approved by the State Commission.

The State Commission has the power under the Arkansas Act to regulate the Company's depreciation reserve and fix rates for accrual thereto. (See Section 19(5), Appendix B, page 29.) The charges to the reserve ordered reversed by the Federal Commission were approved by the State Commission some years prior to action by the Federal Commission. (Exhibit 5, R. 1775-1776).

Whether Section 302(a) of the Federal Power Act may have authorized the Federal Commission to regulate the depreciation reserve and annual accruals thereto is not in issue; the Federal Commission had taken no steps toward the regulation of either the reserves or the accruals. Therefore the State Commission's power over both was not impaired, *Missouri Pacific R. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612 (1909); *Southern R. Co.* v. *Reid*, 222 U. S. 424, 436 (1912); *Smith* v. *Illinois Bell Tel. Co.*, 282 U. S. 133, 159 (1930).

The Federal Commission had no power, in the circumstances here presented, to reverse the legislative action (*Dept. of Public Utilities* v. *Arkansas-Louisiana Gas Co.*, 200 Ark. 983) of the Arkansas Commission with respect to the Company's depreciation reserve, and the Court below, in affirming the order of the Federal Commission, gave effect to an extension of Federal authority not warranted by any provision of the Federal Power Act.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

P. A. Lasley,
Counsel for Petitioner,
Arkansas Power & Light Company.

A. J. G. Priest,
Sidman I. Barber,
Bernal Seamster,
Harry A. Poth, Jr.
Counsel for both Petitioners.

Gordon E. Young,
Of Counsel.

Appendix A

Excerpts from Part II of the Federal Power Act.

(Sec. 201, Federal Power Act; 16 U. S. C. A. Sec. 824):

"(a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

"(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

"(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

"(d) The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any person for resale.

"(e) The term 'public utility' when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

"(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto."

Section 204 (f) of the Federal Power Act, 16 USCA, Sec. 824c(f):

Section 204 (a) gives the Federal Commission jurisdiction over the security issues of public utilities, but the Company is exempt from the provisions of this Section by Section 204 (f) which reads as follows:

"(f) The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission."

Excerpts from Part III of the Federal Power Act.

(Sec. 301, Federal Power Act, 16 U. S. C. A. Sec. 825):

"(a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appro-

priate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

"(b) The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of licensees and public utilities, and it shall be the duty of such licensees and public utilities to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order, require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

"(c) The books, accounts, memoranda, and records of any person who controls, directly or indirectly, a licensee or public utility subject to the jurisdiction of the Commission, and of any other company controlled by such person, insofar as they relate to transactions with or the business of such licensee or public utility, shall be subject to examination on the order of the Commission."

(Sec. 302, Federal Power Act, 16 USCA Sec. 825a):

"(a) The Commission may, after hearing, require licensees and public utilities to carry a proper and adequate depreciation account in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may, from time to time, ascertain and determine, and by order fix, the proper and adequate rates of depreciation of the several classes of property of each licensee and public utiilty. Each licensee and public utility shall conform its depreciation accounts to the rates so ascertained, determined, and fixed. The licensees and public utilities subject to the jurisdiction of the Commission shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such licensee or public utility shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any public utility, the percentage rate of depreciation to be allowed, as to any class of property of such public utility, or the composite depreciation rate, for the purpose of determining rates or charges."

"(b) The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation rates, shall notify each State commission having jurisdiction with respect to any public utility involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations."

Appendix B

Excerpts from the Public Utility Act of Arkansas Act 324 of 1935; Sec. 73-201, et seq., Arkansas Statutes 1947.

(Secs. 8(a) and 8(c) of Act 324, 1935; Secs. 73-202(a) and 73-202(c), Ark. Stat., 1947, respectively):

"The Department herein created is hereby vested with the power and jurisdiction, and it is hereby made its duty to supervise and regulate every public utility in this Act defined, and to do all things, whether herein specifically designated, that may be necessary or expedient in the exercise of such power or jurisdiction, or in the discharge of its duty.

"The Department is hereby empowered, after hearing, and upon notice, to make, and from time to time, in like manner, alter or amend such reasonable rules pertaining to the operation, accounting, service and rates of public utilities, and of the practice and procedure governing all investigations by, and hearing and proceedings before, the Department as it may deem proper and not inconsistent with this Act."

(Sec. 22(a) of Act 324, 1935; Sec. 73-221, Ark. Stat. 1947):

"The Department, by order, may establish uniform system of accounts to be kept by any public utility subject to its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and the Department may prescribe the manner in which such accounts shall be kept."

(Sec. 56 of Act 324, 1935; Secs. 73-252, Ark. Stat. 1947):

"Organizations or reorganizations of all public utilities shall be subject to the supervision and control of the Department, and no such organization or reorganization shall be had or given effect without the written approval of the Department. No plan or organization or reorganization

shall be approved by the Department unless it shall be established by the applicant for such approval that the plan is consistent with the public interest."

(Sec. 57(a) of Act 324, 1935; Sec. 73-253, Ark. Stat. 1947):

"With the consent and approval of the Department, but not otherwise:

(1) Any two or more public utilities may consolidate with each other.

(2) Any public utility may acquire the stock, or any part thereof, of any other public utility.

(3) Any public utility may sell, acquire, lease or rent any public utility plant or property constituting an operating unit or system."

(Sec. 58 of Act 324, 1935; Sec. 73-254, Ark. Stat. 1947):

"The power of public utilities to issue stock, stock certificates, bonds, notes and other evidences of indebtedness, in case of public utilities incorporated under the laws of this State, and to create liens on property in this state, in case of public utilities incorporated under the laws of any state or foreign country, is a special privilege, the right of supervision, regulation, restriction and control of which is, and shall continue to be, vested in the state, and such power shall be exercised as provided by law and under such rules and regulations as the Department may prescribe."

(Sec. 18(a) of Act 324, 1935; Sec. 73-217, Ark. Stat. 1947):

"Unless the Department otherwise orders, no public utility shall make any change in any rate now in force or which shall hereafter have been duly established under this Act, except after thirty days' notice to the Department, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The utility shall also give notice of the proposed changes to other interested

parties as the Department in its discretion may direct. All proposed changes shall be shown by filing new schedules, or shall be plainly indicated upon schedules filed and in force at the time and kept open to public inspection. The Department, for good cause shown, may allow changes in rates, without requiring the thirty days' notice, under such conditions as it may prescribe. All such allowed changes shall be immediately indicated upon its schedule by such public utility."

(Sec. 19 of Act 324, 1935; Sec. 73-218, Ark. Stat. 1947):

"The Department, upon complaint, or upon its own motion, shall, upon reasonable notice and after a hearing, have the power to:

(1) Find and fix just, reasonable and sufficient rates to be thereafter observed, and enforced and demanded by any public utility.

(2) Determine the reasonable, safe, adequate, sufficient service to be observed, furnished, enforced or employed by any public utility and to fix the same by its order, rule or regulation.

(3) Ascertain and fix adequate and reasonable standards, classifications, regulations, practices and services to be furnished, imposed, observed and followed by any or all public utilities; ascertain and fix adequate and reasonable standards for the measurements of quantity, quality, pressure, initial voltage, or other conditions pertaining to the supply of all products, commodities, or services furnished or rendered by any and all public utilities; prescribe reasonable regulations for the examination and testing of such production, commodity or service, and for the measurement thereof, establish or approve reasonable rules, regulations, specifications and standards to secure the accuracy of all meters or appliances for measurement; and provide for the examination and testing of any and all appliances used for the measurement of any product, commodity, or service of any public utility.

(4) Ascertain and fix the value of the whole or any part of the property of any public utility, insofar as the same is material to the exercise of the jurisdiction of the Department, and the Department may make revaluations of the whole or any part of said property from time to time and ascertain the value of any new construction, extension, and additions to, or retirements from, the property of every public utility.

(5) Require any or all public utilities to carry a proper and adequate depreciation account in accordance with such rules, regulations and forms of account as the Department may prescribe; ascertain and determine and by order fix the proper and adequate rates of depreciation of the several classes of property of each public utility. Each public utility shall conform its depreciation accounts to the rates so ascertained, determined and fixed by the Department.

(6) All powers, duties and authority now conferred upon or vested in the Arkansas Corporation Commission under Act 571 of the General Assembly of the State of Arkansas for the year 1919, as amended by Act 124 of the Acts of the General Assembly of the State of Arkansas of 1921, and by Act 12 of the Acts of the General Assembly of the State of Arkansas of 1933, with respect to the public utilities herein defined, are hereby vested in and imposed on the Department of Public Utilities as herein created, and such powers, duties and authority shall hereafter be exercised and discharged by the Department.

If any of such powers, duties and authority shall be in conflict with any other provisions of this Act the other provisions of this Act shall control."

(Sec. 41 of Act 324, 1935; Sec. 73-240 Ark. Stat. 1947):

"No new construction or operation of any equipment or facilities for supplying a public service, or extension thereof, shall be undertaken without first obtaining from

the Department a certificate that public convenience and necessity require, or will require, such constructions or operation; provided that if such construction or operation has been commenced under a limited or conditional certificate, or authority as hereinafter provided in Section 43, this Section shall not be construed to require such certificate nor shall such certificate be required for an extension within any municipality or district within which service has heretofore been lawfully supplied, or for an extension within, or to territory then being served, or necessary in the ordinary course."

(Sec. 64-605, Ark. Stat. 1947):

"Dividends—Reserves—Dividends may be paid to stockholders from the corporation's net earnings, or from the surplus of its assets over its liabilities including capital, but not otherwise. When the directors shall so determine dividends may be paid in stock.

Subject to any restrictions contained in its articles of incorporation, the directors of any corporation engaged in the exploitation of wasting assets may determine the annual net profits derived from the exploitation of such wasting assets without taking into consideration the depletion of such assets resulting from lapse of time or from necessary consumption of such assets incidental to their exploitation.

Nothing contained in this section shall prevent the stockholders of any corporation, or the directors thereof if the articles of incorporation shall so provide, from setting apart out of any of the funds of the corporation available for dividends a reserve or reserves for any proper purpose or from abolishing any such reserve in the manner in which it was created.

A director shall be fully protected in relying in good faith upon the books of account of the corporation or statements prepared by any of its officials as to the value and amount of the assets, liabilities and/or net profits of the

corporation, or any other facts pertinent to the existence and amount of surplus or other funds from which dividends might properly be declared and paid. (Acts 1931, No. 255, Sec. 25, p. 795; Pope's Dig., Sec. 2183.)"

(Sec. 64-606, Ark. Stat. 1947):

"Unlawful dividends—Unlawful withdrawals or decreases of capital—Liability of directors—The directors of a corporation shall not make dividends except as provided in Section 25 (Secs. 64-605) hereof, nor shall they divide, withdraw or in any way pay to the stockholders or any of them in any part of the capital of the corporation or decrease its capital except as provided by this act. In case of any wilful or negligent violation of the provisions of this section, the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered upon the minutes of the directors at the time, or, who not being then present shall have filed their written dissent therefrom with the corporation on learning of such action, shall be liable at any time within two (2) years after such violation, to the corporation, or in the event of its dissolution or insolvency, to its creditors, or any of them, to the full amount of the dividends made or of any loss sustained by the corporation by reason of such withdrawal, divisions or decreases of capital. But no action shall be brought hereunder by the creditors of a corporation until judgments for their claims are recovered against the corporation and executions thereon have been returned unsatisfied in whole or in part. (Acts 1931, No. 255, Sec. 26, p. 795; Pope's Dig., Sec. 2184.)"

Excerpts from Act 40 of the Acts of the General Assembly of Arkansas Approved February 12, 1945, Being Entitled: "An Act to Consolidate Arkansas Corporation Commission and the Department of Public Utilities, and for Other Purposes."

"SECTION 1.

Sub-Section B. Upon the appointment and qualification of the Commissioners as provided for herein, the Department of Public Utilities shall cease to exist and all of the authority, rights, powers, duties, privileges and jurisdiction of both the Department of Public Utilities and the Arkansas Corporation Commission are hereby expressly conferred upon the Arkansas Public Service Commission as fully as if so named in any law or laws of this State; that all actions, proceedings and hearings of whatsoever nature then or hereafter pending before said Department of Public Utilities and the Arkansas Corporation Commission shall be transferred to the Arkansas Public Service Commission in the same manner and subject to the same incidents and with the same results as though they had originated with the Arkansas Public Service Commission, and all actions, proceedings and hearings of whatsoever nature then or hereafter pending in the name of the Department of Public Utilities and the Arkansas Corporation Commission shall survive and be continued, heard and determined by and in the name of the Arkansas Public Service Commission; * * *".

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 596

ARKANSAS PUBLIC SERVICE COMMISSION, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit and Brief in Support Thereof

IKE MURRY,
Attorney General, State of Arkansas,

SCOTT WOOD, *Chairman,*
Arkansas Public Service Commission,
State Capitol Building,
Little Rock, Arkansas.

H. CECIL KILPATRICK,
CECIL A. BEASLEY, JR.,
American Security Building,
Washington, D. C.,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.

ARKANSAS PUBLIC SERVICE COMMISSION, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit and Brief in Support Thereof

---

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on November 9, 1950, affirming an order of the Federal Power Commission dated February 15, 1949 in the case between the above-styled parties docketed in said Court of Appeals as No. 10278.

SUMMARY STATEMENT OF FACTS

Petitioner, the Arkansas Public Service Commission, is an agency of the State of Arkansas to which the State has delegated virtually all of the regulatory authority which the State as a sovereign possesses over public utilities (Appendix A, § 19(6), p. 3).

The Arkansas Department of Public Utilities, predecessor of Petitioner, was created by Act 324 of the Acts of the General Assembly of Arkansas approved April 2, 1935 (Appendix A, § 8(a), 19(6), pp. 1, 3).[1] This Act gives the State Commission comprehensive powers. Construing the statute, the Arkansas Supreme Court in *Department of Public Utilities* v. *The Arkansas Louisiana Gas Company*, 200 Ark. 983, 986, 142 S. W. 2d 213, 215 (1940), held "it (the State Commission) was established by the legislature to act for it and it has the same power the legislature would have, it acting within the power conferred by the Act."

Among other things the State Commission is authorized to make rules pertaining to accounting of public utilities, to classify public utilities and to establish a uniform system of accounts for each class and to prescribe the manner in which such accounts shall be kept (Appendix A, § 8(c), 22(a), pp. 1, 3). The Commission is given power to supervise, regulate, restrict and control the issuance of stocks, bonds, notes and other evidence of indebtedness by all public utilities doing business in Arkansas (Appendix A, § 58, p. 4), and to fix, regulate and control both rates for energy sold consumers and the Company's earnings (Appendix A, § 18(a), p. 1) to support the value of such securities. The State Commission has the power to determine the adequacy of service (Appendix A, § 19(3), p. 2), to grant or withhold certificates of public convenience and necessity for

[1] Petitioner is the successor to, and has all the authority previously vested in, the Department of Public Utilities (Appendix A, § 19(6), p. 3). Both are hereinafter referred to as "State Commission."

new construction and operation (Appendix A, § 41, p. 3), to fix proper and adequate rates of depreciation and to require the Arkansas Power & Light Company (hereinafter sometimes called the Company) to carry a proper and adequate depreciation reserve (Appendix A, § 19(5), p. 3).

The Company was organized under the laws of the State of Arkansas on October 2, 1926 and is an operating public utility distributing electric energy to homes and industries within the State of Arkansas. It is also engaged in the local distribution of steam heat, a local activity not subject to regulation by the Federal Commission. The Company operates two hydro-electric projects, licensed by the Federal Commission and is a "public utility" and "licensee" within the meaning of the Federal Power Act.

In excess of 98% of the Company's electric facilities, based on original cost, are used primarily or exclusively for generating and distributing electric energy to consumers within the State of Arkansas and more than 90% of the Company's gross electric revenue arise from sales to consumers in Arkansas which are subject only to state regulation. Rates at which such local sales are made are within the exclusive regulatory power of the State Commission (Appendix A, § 18(a), p. 1, Appendix B, § 201(b), p. 6) and in fixing these rates the State Commission is charged with the duty of determining the benefits to the State arising from investment by the Company in properties representing more than 98% of all of its properties and, therefore, of determining the book value of such assets.

By its order of July 2, 1937 the State Commission took and has since retained jurisdiction over the Company's business. On June 24, 1944 the State Commission entered a comprehensive order which, among other things, determined the prudent investment by the Company in its electric facilities for the purpose of authorizing securities and fixing rates and included in the base so determined

the amount of $6,247,200.04 [2] which it found to be the excess of arm's-length cost to the Company over and above the original cost. The State Commission included such amount in the rate base because it found the amount represented actual cash or equivalent expenditure for assets of present and continuing local value, serving the public interest of the State of Arkansas.

Although fully apprised of the State Commission's order of June 24, 1944, the Federal Commission proceeded with its own reclassification proceeding [3] in which proceeding the State Commission intervened and contended that the Federal Commission does not have the authority it claims. The Federal Commission issued on February 15, 1949 its order which directs the Company to charge against surplus immediately or amortize over a period of twelve years by deductions from net earnings (and thereby eliminating as an asset in the Company's basic corporate accounts) the sum of $6,210,240.04 [4] which the State Commission had determined represented an expenditure for value when made and was an asset of present and continuing worth to the people of Arkansas.[5]

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[2] The State Commission directed that the full amount of $6,247,200.04 be recorded in Account 100.5, Electric Plant Acquisition Adjustments, where it would remain a part of the Company's rate base. (Actually, the State Commission directed that $6,947,052.92, the total difference found by the State Commission between original cost of the Company's electric properties and actual arm's-length cost thereof, be recorded in Account 100.5. However, by the time of the issuance of the Federal Power Commission's order affirmed by the Court below, the State Commission had agreed to reduce this amount to $6,247,200.04, the reduction having to do principally with the cost of licensed projects over which the State Commission concedes the Federal Commission has jurisdiction.)

[3] This proceeding is Federal Power Commission Docket No. IT-5829 and is entitled "In the Matter of Arkansas Power & Light Company." The order affirmed by the Court below was issued, together with accompanying findings and opinion, in this Docket on February 15, 1949.

[4] During the proceedings before the Federal Commission, the Company with the consent of the State Commission, agreed that $36,960 of the $6,247,200.04 which the State Commission included in the rate base, could be charged off immediately. Consequently, the amount in actual controversy is reduced by $36,960.

[5] Of the $6,247,200.04 involved in the Federal Commission's order, the Company is directed to amortize $5,176,613.91 over a period of twelve years against annual earnings and to write off immediately by charges to earned surplus or to capital surplus the amount of $1,070,586.13 (actually $1,033,626.13 when the $36,960 is deducted in accordance with the agreement referred to in the immediately preceding footnote).

In 1942 the Company sold its then remaining water and ice properties for less than the book cost assigned to them. This difference, in the amount of $2,968,563, was charged in its entirety to the depreciation reserve which was a composite retirement account applicable to all departments of the Company, water, ice, electric, gas and transportation. According to the Federal Commission there was in the composite retirement account at the time of such charge a credit on account of water and ice properties of only $601,678. The Federal Commission in its order directs that the sum of $2,968,563, less the amount of $601,678, or $2,366,885, should be credited to the depreciation reserve and charged to capital or earned surplus. On the other hand, the State Commission in its order of June 24, 1944 approved the entries made in 1942 with respect to the disposition of the water and ice properties and the books of the Company have been kept in accordance with the State approval.

There is no controversy whatsoever in this case regarding licensed projects since the State Commission has conceded dominant accounting jurisdiction over such accounts to the Federal Commission and approved entries directed by the latter therein.

Revision of its basic corporate books by the Company in accordance with the order of the Federal Commission will violate the order of the State Commission by requiring disposition of substantial amounts contrary to their treatment as presently required and as required since 1944 by the State Commission in the performance of its statutory duties to control local affairs of the State of Arkansas.

In excess of $60,000,000 of the Company's securities are now outstanding which the State Commission has approved and which have been distributed directly or through the common stock of Middle South Utilities, Inc. (owner of all of the common stock of the Company) to the public on the basis of accounts as kept by the Company in accord-

ance with orders of the State Commission. Furthermore, these securities have been issued on the basis of items including, among others, the $6,247,200.04 paid for acquisition of local electric properties found by the State Commission to represent value at the time when expended and at the time of the State Commission's order. It is upon such values that the Company will in the future continue to earn on the basis of 100% of the values as found by the State.

Petitioner filed a petition for review of the Federal Commission's order with the United States Court of Appeals for the District of Columbia Circuit (case No. 10278 therein) as did the Company and Middle South Utilities, Inc. (case No. 10276 in the Court below). The Court of Appeals consolidated the two reviews for the purpose of filing a joint appendix to the briefs and for argument and issued a single opinion and judgment in both cases (with one judge dissenting) which affirmed the order of the Federal Commission. Petitions for rehearing were denied, with one judge again dissenting. On February 6, 1951 the Company and Middle South Utilities, Inc., filed with this Court their Petition for a Writ of Certiorari together with copies (certified by the Court of Appeals) of the consolidated record (including the joint appendix) in both appeals No. 10278 and No. 10276. The Petition for Certiorari by the Company and Middle South Utilities, Inc., has been assigned No. 535 by the Clerk of this Court.

OPINIONS

The opinion and order of the Federal Power Commission, FPC Docket No. IT-5829, dated February 15, 1949, and the order denying Petitioner's Application for Rehearing have not been officially reported. The opinion and order of the Commission appear at R. 253-298.

The opinion of the Court of Appeals for the District of Columbia Circuit was entered on November 9, 1950 and the order of that Court denying rehearing and modifying its

original opinion was entered December 8, 1950.[6] The opinion and order are not yet officially reported but appear at R. 2029-30. The order denying the petitions for rehearing and modifying the original opinion appears at R. 2051.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code (28 U. S. C. Section 1254(1)) and Section 313(b) of the Federal Power Act (16 U. S. C. 825 *l*(b)).

STATUTES INVOLVED

Relevant portions of the Arkansas Statutes are set forth in Appendix A hereto, pages 1 through 5 inclusive. Relevant portions of the Federal Water Power Act are set forth in Appendix B hereto, pages 6 through 9 inclusive.

QUESTIONS PRESENTED

1) Whether the Federal Water Power Act[7] in Section 301(a) or elsewhere confers upon the Federal Commission dominant accounting jurisdiction enabling it to exclude all control whatsoever by a sovereign State over the basic corporate accounts of a predominantly local public utility.

2) Whether the Act in Section 301(a) or elsewhere confers upon the Federal Commission dominant accounting authority which it may exercise to impair, interfere with or handicap the exercise by the State of substantive regulatory powers delegated by the State to its Public Service

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[6] In its original opinion the Court of Appeals stated that the Company had abandoned on oral argument "the contention in its brief that the adjustments ordered by the Federal Commission were arbitrary and capricious". In its order denying the petitions for rehearing the Court amended its opinion to read that the Company had abandoned "the contention in its brief that the adjustments ordered by the Federal Commission were arbitrary and capricious apart from their inconsistency with the order of the Arkansas Commission". The original opinion was not modified in any other respect.

[7] Hereinafter sometimes referred to as the "Act".

Commission and, in certain respects, expressly reserved to the States by the Federal Power Act.

3) Whether the order of the Federal Commission, if it has dominant authority over the basic corporate accounts, is nevertheless void because it arbitrarily and unreasonably reverses findings of the State Commission as to the propriety of and value to the State of expenditures by a predominantly local utility company to acquire properties located exclusively within the State and used and useful in the rendition to state customers of service subject solely to local regulation.

4) Whether the order of the Federal Commission, if it has dominant authority over the basic corporate accounts, is nevertheless void because it arbitrarily and unreasonably ignores actualities in that it requires the elimination from the basic corporate accounts of millions of dollars of assets representing values upon which the State Commission has since 1944 allowed and will continue to allow the Company to earn a fair return which fully supports the securities which the State Commision has authorized to be issued against such values.

5) Whether the order of the Federal Commission, if it has dominant authority over the basic corporate accounts, is nevertheless void because it unnecessarily and unreasonably interferes with the exercise by the State Commission of substantive regulatory powers concededly within the exclusive jurisdiction of the State Commission.

6) Whether the Court of Appeals erred in failing to give any consideration whatsoever in reaching its decision to the jurisdictional conflict between the Federal Commission and the State of Arkansas.

7) Whether the Court of Appeals erred in failing to recognize that the precise issues presented by this review have not been decided in prior cases.

8) Whether the Court of Appeals erred in failing to resolve the jurisdictional conflict and to define with preciseness (as required by the issues of this case) the respective spheres of state and federal authority.

REASONS FOR GRANTING THE WRIT

1. The State Commission's claim to accounting authority is limited to those matters which are peculiarly within the sphere of state regulatory control and competence. The conflict results from the Federal Commission's claim of complete overriding accounting jurisdiction. If the adjustments ordered by the Federal Commission are sustained and recorded in the Company's basic corporate accounts, more than $8,000,000 will be written out of the accounts as now and since 1944 kept by the Company pursuant to orders of the State Commission. Such accounts will no longer reflect the prudent investment which represents continuing value to the people of Arkansas and upon which the State Commission has since 1944 allowed the Company to earn a fair return and upon which it has authorized the issuance of securities. Since there can be only one set of official accounts in regard to the controverted amounts, the conflict is irreconcilable. The case raises issues unlike others heretofore presented to the courts not only because of the irreconcilable nature of the conflict but also because the controversy involves not matters of mere bookkeeping but interference with substantive regulatory authority of a state. This case, unlike others, does not involve differences with regard to original cost nor claimed costs of licensed projects. Likewise, no case has heretofore been presented where a state commission has, after findings by a state commission of the nature here involved, included the amounts in question as a part of prudent investment, approved the issuance of millions of dollars of securities on the basis of such prudent investment and afforded the Company virtually all of its revenues thereon.

2. One of the most important responsibilities of the State Commission is to regulate the Company so that there will be available at all times capital for current operations and future expansion necessary to meet the social and economic needs of the people of Arkansas. The State and not the Federal Commission has authority to control and supervise the issuance of securities. The order of the Federal Commission requiring the write-off of assets included as a part of the Company's prudent investment will seriously interfere with the State Commission's responsibility and function in regard to raising capital to meet local needs of the State. Because of the close relationship between control over the raising of capital and other matters of regulation concededly within the sphere of the State Commission, the order of the Federal Commission will interfere with the State Commission's authority in other important respects.

3. The position of the State Commission is supported by the language of Section 301(a) and by the legislative history of the Act which clearly establish that Congress intended to reserve to the states all authority required for the performance of the states' regulatory responsibilties over operating companies subject to their jurisdiction. Had Congress intended to confer upon the Federal Commission the overriding accounting authority for which it contends, it would have done so by explicit language. When Congress has intended to confer upon a federal agency such power it has in fact done so affirmatively and by unambiguous language.

4. Assuming that the Federal Commission has paramount authority over the fundamental accounts of the Company, the order here under review is void because it arbitrarily requires amounts in the Company's fundamental books to be written off regardless of whether such amounts represent actual value. The order is void for the additional reason that it would result in the basic corpo-

rate accounts concealing rather than disclosing facts. Finally, the Federal order is arbitrary for the reason that the overriding power which the Federal Commission seeks unreasonably interferes with the substantive regulatory powers of the State of Arkansas.

5. This case raises important questions of conflicting state and federal jurisdiction which have never been passed upon by the courts and which are not resolved by the opinion of the Court of Appeals. The majority opinion of the Court below does not meet the issue of (a) whether it was the intent of Congress in the Federal Power Act to permit the impairment of state powers which under the circumstances here present will necessarily ensue from affirmance of the order of the Federal Commission or (b) whether, as your Petitioner contends, it was the intention of Congress to correlate the respective federal and state jurisdictions so as to reserve to the states all power necessary to control matters concededly subject to local regulation. Petitioner respectfully submits that the State of Arkansas and other states are entitled to have these issues met and to know (on the basis of complete and informative directives by the judicial branch of the Federal Government) precisely why and where the line of delineation between federal and state power is to be drawn where, as here, mutually exclusive authority is asserted by both the Federal Commission and the State. Finally, the decision and the judgment of the Court of Appeals decide

federal questions in a way which conflicts with the Federal Power Act and with applicable decisions of this Court.

WHEREFORE, it is respectfully submitted that this petition should be granted.

IKE MURRY,
Attorney General, State of Arkansas.

SCOTT WOOD,
Chairman, Arkansas Public Service Commission,
State Capitol Building,
Little Rock, Arkansas.

H. CECIL KILPATRICK,

CECIL A. BEASLEY, JR.,
American Security Building,
Washington, D. C.,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

ARKANSAS PUBLIC SERVICE COMMISSION, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

For statement of the case and also statements as to the opinions below, jurisdiction, questions presented, and statutes involved reference is made to the foregoing petition. Some additional statements of fact are made in the argument in this brief.

This case presents a controversy between a state commission and the Federal Power Commission regarding jurisdiction over the "basic corporate accounts" of a predominantly local public utility operating company. The accounts involved are those upon which must be determined the value of the business, accounts which form the basis for accounting by management of its trusteeship and for representations as to the results of operations and of financial condition to stockholders, prospective investors and to the public. In short, the controversy involves "basic corporate accounts" in the sense that the Company can have only one set of such accounts. This case deals with a conflict between sovereign jurisdictions over the sole right to control the *official* accounts and is, therefore, unlike those

in which this Court has permitted two commissions to require a utility company to keep different sets of accounts, one being mere "memorandum" accounts.

Nor is this case like those where the adjustments sought to be made by the Federal Commission involve claimed costs of a licensed project and where the licensee has been held to have accepted the license subject to certain rights in the Federal Commission to determine book value of such properties. There is no controversy here regarding any such issue. This case also presents a conflict which involves substantive regulatory controls themselves, to the administration of which accounting is only a means.

ARGUMENT.

I. The Federal Power Act Does Not Confer Upon the Federal Commission the Overriding Accounting Jurisdiction It Claims In This Case and the Judgment of the Court of Appeals Which Has the Effect of Upholding Such Claim Is In Conflict With Decisions of This Court.

Wherever Congress has intended that the accounting authority of a federal agency should be paramount it has so stated in clear, unambiguous and direct terms. It is significant that Congress omitted from Section 301(a) and the entire Federal Power Act language similar to that it used in Section 220(g) of the Act of 1934 creating the Federal Communications Commission and in Section 407(d) of the Civil Aeronautics Act of 1938 (Appendix C, p. 10). In both of these statutes, one passed before and one after Section 301(a) of the Federal Power Act, Congress used express language to provide that the Federal Commission should have overriding and paramount accounting authority.

The overriding power which the federal commission claims must be affirmatively granted and cannot be supported by inference alone. The United States Supreme Court, in construing the Federal Power Act, has stated:

"* * * and it is applicable to this case, that 'Where a Federal agency is authorized to invoke an overriding Federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of Federal authority to act should appear affirmatively and not rest on inference alone'. *Yonkers* v. *United States,* 320 U. S. 685, 692, 88 L. Ed. 400, 404, 64 S. Ct. 327; *Florida* v. *United States,* 282 U. S. 194, 211, 212, 75 L. Ed. 291, 301, 302, 51 S. Ct. 119; cf. *Palmer* v. *Massachusetts,* 308 U. S. 79, 84, 84 L. Ed. 93, 97, 60 S. Ct. 34, 41 Am. Banker Rep. (NS) 134; *Federal Trade Commission* v. *Bunte Bros.,* 312 U. S. 349, 351, 85 L. Ed. 881, 883, 61 S. Ct. 580. Nothing except explicit findings excluding the grounds of state control gives assurance that the bounds of Federal jurisdiction have been accurately understood and fully respected, and that state power has been considerately and deliberately overlapped." (*Connecticut Light & Power Co.* v. *Federal Power Comm'n,* 324 U. S. 515 at 532, 89 L. Ed. 1150 at 1161.)

In *Kirschbaum* v. *Walling,* 316 U. S. 517, 86 L. Ed. 1638 (1942), a case which presented the problem of determining the limit to which jurisdiction had been vested in the federal government and taken from a state, the Supreme Court stated at page 521, 86 L. Ed. at 1646:

"We cannot, therefore, indulge in the loose assumption that when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to legislation. Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation."

The position of the Federal Commission is that Congress in Section 301(a) conferred upon it exclusive jurisdiction

over the fundamental accounts of public utilities and licensees in all respects and without limitation or exception. The language of Section 301 (a) itself refutes this claim of the Federal Commission. Section 301 (a) authorizes the Federal Commission to control only those accounts "necessary or appropriate for the purposes of the administration of this Act * * * ". Furthermore, even this authority is made subject to the express condition

> "That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State".

The legislative history of the bill containing Section 301 (a) shows clearly that the intention of Congress was to reserve to the states all authority required for the performance of the states' regulatory responsibilities over public utility operating companies subject to their jurisdiction, including control over the fundamental accounts of such companies.

This conclusion is supported by the opinion of the Circuit Court of Appeals for the Fifth Circuit in *Alabama Power Co.* v. *Federal Power Commission*, 134 F. 2d 602 (1943). In considering the inter-relationship of state and federal accounting control over a predominantly intrastate operating company which owned licensed projects, the court at page 611 directed attention to the specific question here discussed:

> " * * * The Alabama Company has many power properties not licensed by the United States, and these and the licensed projects are integrated into a great power system. It may be that the State scheme of accounts is not the same as the accounts required by the Commission to be kept for the purposes of the federal Act. It may be that the Alabama Company for the information of its stockholders and the commercial public as well as for its own business convenience needs still other accounts and records. *We think the Com-*

mission has not authority to order entries upon any of these accounts except those which it requires kept for the purposes of the federal Act." (Emphasis added.)

II. The Exclusive Accounting Control For Which the Federal Commission Contends Will Result in Serious Impairment of Substantive Regulatory Functions of the State Commission.

The State Commission is the only regulatory authority having comprehensive jurisdiction over the Company (Appendices A and B). The Federal Commission would nevertheless make books maintained according to its directives the basis for financial statements, the sale of securities and of informing the public generally regarding the affairs of the Company. It would relegate the State Commission in its important regulatory activities to memoranda or supplementary accounts.

Millions of dollars of the Company's securities are now outstanding which the State Commission has authorized on the basis of the accounts (and values reflected therein) as kept by the Company in accordance with orders of the State Commission. In regulating and controlling the issuance of these securities of the Company, the State Commission performed (as it will in the future) a function which the Federal Power Act expressly reserves to the states and in connection with which it specifically excludes action by the Federal Commission (Section 204(f), Appendix B, p. 7).

The State Commission cannot conceivably have the control over security issues and evidences of indebtedness which is contemplated by both the laws of Arkansas and by the Federal Power Act if the Company at the same time is required to inform the investment community, creditors and stockholders on the basis not of the State Commission accounts pursuant to which rates are fixed and earnings determined and not on the basis of which real values exist, but on the basis of books kept in accordance with the Federal Commission which would fail to include millions of dol-

lars determined by the State to have value of social and economic consequence to the State of Arkansas and upon which the State Commission would continue to permit the Company to earn.

Federal interference with state authority in the field of securities will go far to defeat the dual regulatory system which Congress clearly intended to promote in the 1935 legislation. Control over securities is one of the most significant aspects of state regulation and it is peculiarly within the competence of effective regulation of local companies by local authority as distinguished from federal authority. The Congress, in enacting Section 204(f) undoubtedly considered that such a company as the Arkansas Power & Light Company could be and would be effectively regulated by the State. The Federal Commission does not have a similar competence to supervise and regulate the Company's affairs so that there will be available capital required to finance operation of the Company's present facilities and expansion of the Company's service in the future to meet *the social and economic requirements of the people of Arkansas.*

Maintenance of adequate service standards (a matter exclusively within the State's jurisdiction) and expansion to meet the growing needs of the State of Arkansas (likewise exclusively within the jurisdiction of the State of Arkansas) are wholly dependent upon the control of securities. Other fields of regulation including rates and the Company's earnings are so closely interrelated with control and supervision of the issuance of securities that interference with the State Commission's authority in this respect will necessarily handicap exercise of its regulatory powers over such other subjects.

III. Assuming That the Federal Commission Has Dominant Authority Over the Basic Corporate Accounts, the Decision and Judgment of the Court of Appeals Are Nevertheless In Probable Conflict With Decisions of This Court for the Reason They Fail to Reverse the Federal Order as Being Arbitrary, Unreasonable and, Therefore, Void.

In a proceeding completed prior to issuance of the Federal order and after full consideration of the facts with respect to value of the Company's assets, the State Commission determined both the original cost and the cost to the Company of its electric property, directed the Company to establish the amount so determined in its basic corporate accounts, established a prudent investment rate base which included the controverted $6,210,240.04 of excess cost to the Company over original cost as a part of the prudent investment and provided for the allowance of a fair return thereon. Full consideration was given by the State Commission to whether there was value to the people of Arkansas behind the $6,210,240.04 classified in Account 100.5 and accorded by the State Commission book value as an integral part of the investment of the Company. This amount the Federal Commission would require the Company to write out of its basic corporate books by charges to surplus or by amortization from earnings on the grounds that it represents intangibles of inferior value. No part of such investment, however, has been lost and such costs have not changed. The properties, furthermore, at the time the determinations were made by the State Commission were and continue to be used and useful for the performance of local service.

That the Arkansas State Commission is the proper agency to determine matters of local value and that such determination should be accorded finality is indicated by the case of *Arkansas Corporation Commission* v. *Thompson*, 313 U. S. 132, 85 L. Ed. 1244 (1941). The question there involved concerned the power of a federal bankruptcy court

to revise for state tax purposes the property value of a railroad in reorganization under section 77 of the Bankruptcy Act, 11 U. S. C. A. 205, although the State Commission had already determined such value through its own agency and in accordance with valid state law. This Court, in deciding that the federal court did not have such power, noted that the Arkansas Corporation Commission was a quasi-judicial agency entrusted with wide responsibilities in connection with the general tax system of the state upon which the "state relies for the hearing and determination of matters essential to the maintenance and fair functioning of a uniform tax system."

Later cases citing with approval the holding in *Arkansas Corporation Commission* v. *Thompson, supra,* in regard to the *res adjudicata* character of the determinations of value by state *quasi-judicial* bodies for purposes of tax assessments include *In re Monongahela Rye Liquors,* 141 F. 2d 864 (C. C. A. 3d 1944); *Baumann* v. *Sheehan,* 140 F. 2d 747 (C. C. A. 8th 1944); *Quinn* v. *Aero Services,* 172 F. 2d 157 (C. C. A. 9th 1949); *Pennsylvania* v. *Aylward,* 154 F. 2d 714 (C. C. A. 8th 1946); *Gardner* v. *New Jersey,* 329 U. S. 565, 91 L. Ed. 504 (1947).

In *American Telephone & Telegraph Co.* v. *United States,* 299 U. S. 232, 81 L. Ed. 142, 149 (1936), the Supreme Court, in construing a system of accounts prescribed by the Federal Communications Commission which included a classification substantially the same as Account 100.5 of the Federal and State Commissions' systems here involved, held that the Federal Communications Commission could not order the writing-off of a true increment of value and that "only such amount will be written off as appears upon an application for appropriate directions, to be a fictitious or paper increment." Despite this law and despite the fact that the State now provides for a full rate upon the values found by it, the Federal Commission nevertheless characterizes certain of such assets as without value and would re-

quire the Company to write them out of its fundamental accounts.

Since the State Commission has accorded the assets involved both value and earning power and since the Federal Commission cannot realistically and without ignoring the actual facts treat the $6,210,240.04 item as a fictitious and worthless paper increment, it follows that the order of the Federal Commission requiring that such amount be charged off to surplus or amortized by annual charges against earnings, is arbitrary, unreasonable and void.

In addition to its failure to recognize assets of true value, the Federal order is unreasonable on the further ground that it would result in the basic corporate accounts concealing rather than disclosing facts. The Federal order will compel the Company to reflect in its basic corporate books losses which it has not suffered and to show a write-off of investment which in fact will continue to be an asset on which the Company will earn revenue.

Finally, the order of the Federal Commission is arbitrary and unreasonable because it impairs substantive regulatory powers of the State, as discussed in the immediately preceding section of this brief.

For the above reasons, therefore, the Federal order is void even if it is assumed that dominant *accounting* jurisdiction has been conferred upon the Federal Commission.

IV. The Court of Appeals Erred In Failing to Recognize and Consider In Reaching Its Judgment the Irreconcilable Nature of the Conflict Between the State and the Federal Commission and the Fact That Such Conflict Presents Issues Never Heretofore Decided By the Courts.

The claim of the State Commission to jurisdiction over the basic corporate accounts is stated in its order of June 24, 1944:

> "The Department has jurisdiction to 'establish a uniform system of accounts' to be kept by Respondent

> and to 'prescribe the manner in which such accounts shall be kept'. The Department, therefore, finds that it has jurisdiction to prescribe the manner in which the Respondent keeps its corporate books, accounts and records, and that the books, records and accounts so prescribed by this Department shall be the official corporate accounts and records of the Company."

The position of the Federal Commission is stated in its opinion accompanying the order affirmed by the Court of Appeals:

> "* * * our accounting rules and regulations and our order in this case run to the fundamental or basic corporate books and records of the company subject thereto. We must, necessarily, in order to achieve the purposes of the Act, require that the accounts kept pursuant to our requirements be the fundamental or basic corporate accounts and not mere memorandum accounts set up for that purpose."

It is apparent that both commissions claim exclusive jurisdiction over the basic corporate accounts except, of course, insofar as they relate to licensed projects in connection with which the State concedes paramount Federal control. The Court of Appeals itself has recognized that this conflict goes beyond the claim of authority to make mere bookkeeping or accounting entries and touches actual property rights.[1] The Court's language follows:

> "The confusion as to the issues which is apparent in the briefs filed with us should be dispelled by the reali-

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[1] This matter came before the Court of Appeals at an earlier date under the following circumstances: The Federal Commission in 1945 set the case for hearing and prior to the beginning of such hearings the Company filed a complaint in the United States District Court for the District of Columbia seeking an injunction against the Federal Commission and a declaratory judgment settling the conflict between the State and Federal Commissions. The District Court granted the Federal Commission's motion to dismiss (*Arkansas Power & Light Co.* v. *Federal Power Commission*, 60 F. Supp. 907 D. C. D. C. 1945), the Court of Appeals reversed (*Arkansas Power & Light Co.* v. *Federal Power Commission*, 81 U. S. App. D. C. 178, 180, 156 F. 2d 821, 1946) and this Court reversed the Court of Appeals solely on the grounds that the Company had "failed to exhaust its administrative remedies" (*Federal Power Commission* v. *Arkansas Power & Light Company*, 330 U. S. 802, 91 L. Ed. 1261 (1947)).

zation that a public utility cannot keep more than one set of actual official corporate accounts. * * *

"Of course it is readily apparent that a public utility can prepare and submit, whenever necessary or required, pro forma accounts, showing what its status would have been had entries been recorded in its books other than those which actually were made; or what the result would have been had various items been placed under headings other than those under which they were actually placed in the official records; or what the situation would have been had this or that capital asset been eliminated by a charge to surplus or annual amortizing charges against earnings. Such alternative accounts are simply in the nature of memoranda, and can never be said to be the official corporate records.

"But when a regulatory commission asserts the right to command that an item which another commission, also claiming jurisdiction, has treated as a valuable asset, be charged to surplus or amortized through charges to earnings, the commission which asserts such right to command unquestionably is saying that accounts kept in response to its orders must be, not mere memoranda, but the official corporate records. Such action goes beyond a claim of authority to make bookkeeping or accounting requirements, and touches actual property rights." (*Arkansas Power & Light Co.* v. *Federal Power Comm'n*, 81 U. S. App. D. C. 178, 180, 156 F. 2d 821, 823 (1946).)

The jurisdictional conflict is for the State of Arkansas the most important issue in the case. The Federal Commission's assertion of paramount accounting authority is based upon the assumption that the Federal Commission can determine values and control accounts in complete isolation from and in disregard of the State's findings regarding the Company's local activities and investments. It is based upon the further assumption that the Federal Commission can indirectly through accounting control exercise substantive regulatory powers delegated to and reserved for the states.

In its opinion (R. 2030) the Court of Appeals states:

> "The Company and its parent corporation, together with the Arkansas Public Service Commission, contend that because the Company is subject to inconsistent accounting requirements of the Arkansas Commission, the Federal Commission's order is invalid. The law is settled to the contrary."

The contention of Petitioner goes much further than the claim that the conflicting accounting requirements of the two Commissions are merely "inconsistent." Within their sphere of conflict, the orders are *mutually exclusive* and involve a serious conflict over substantive regulatory authority. The law is very definitely not settled to the effect that the Federal Commission can oust a State Commission of accounting jurisdiction over "basic corporate accounts" in the sense that there can be only one such set of accounts. Although ignored by the majority opinion, the unique nature of this case had earlier been recognized by the Court of Appeals in the following language:

> "This case is not like those in which the courts, including the Supreme Court, have permitted two commissions, each having authority in the premises, to require a utility company to keep different sets of accounts, one to accord with the requirements of one commission, and another to meet the requirements of the other commission. For those cases do not deal with a conflict between jurisdictions over the sole right to prescribe official accounting methods, and go no further than to point out the right of a second commission to demand memorandum accounts to suit its purposes, which may differ from the accounts required by another commission which also has authority in the premises." (*Arkansas Power & Light Co.* v. *Federal Power Comm'n, supra,* at 179, 156 F. 2d at 822.)

Futhermore, there is no controversy in this case regarding control over the basic corporate accounts insofar as they involve licensed projects, and prior decisions having

to do with conflicting accounting claims over the original costs of or other accounting entries and adjustments concerning licensed plants are not applicable. Reliance by the Court below upon such decisions is unjustified.

Nowhere in its opinion does the majority of the Court of Appeals meet, much less resolve, the issues discussed in this section of the brief. Its decision reflects a total failure to recognize the irreconcilable nature of the conflict involved. The majority opinion ignores the contention of your Petitioner that it was not the intent of Congress in the Federal Power Act to permit, through the indirect exercise of claimed accounting jurisdiction, the impairment of regulatory powers of the State of Arkansas which will neccessarily result from the affirmance of the order of the Federal Commission. The majority opinion of the Court of Appeals (without discussion and perhaps without even consideration) places the judicial stamp of approval upon an order which precludes any jurisdiction whatsoever by a State Commission over the basic corporate accounts of a predominantly local public utility company and ignores the contention of Petitioner that it was the intention of Congress to correlate the federal and state jurisdictions so as to reserve to each the accounting authority necessary to perform their respective regulatory functions. Petitioner submits that in failing to weigh these issues the Court of Appeals erred and that proper consideration thereof will require reversal of the Court below.

For the reasons stated, the foregoing Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

IKE MURRY,
Attorney General, State of Arkansas.

SCOTT WOOD,
Chairman, Arkansas Public Service Commission,
State Capitol Building,
Little Rock, Arkansas.

H. CECIL KILPATRICK,

CECIL A. BEASLEY, JR.,
American Security Building,
Washington, D. C.,
Attorneys for Petitioner.

APPENDIX A

Arkansas Statutes

Excerpts from the Public Utility Act of Arkansas, Act 324 of 1935

(Secs. 8(a) and 8(c) of Act 324, 1935; Secs. 73-202(a) and 73-202(c), Ark. Stat., 1947, respectively.)

"The Department herein created is hereby vested with the power and jurisdiction, and it is hereby made its duty to supervise and regulate every public utility in this Act defined, and to do all things, whether herein specifically designated, that may be necessary or expedient in the exercise of such power or jurisdiction, or in the discharge of its duty."

"The Department is hereby empowered, after hearing, and upon notice, to make, and from time to time, in like manner, alter or amend such reasonable rules pertaining to the operation, accounting, service and rates of public utilities, and of the practice and procedure governing all investigations by, and hearing and proceedings before, the Department as it may deem proper and not inconsistent with this Act."

(Sec. 18(a) of Act 324, 1935; Sec. 73-217, Ark. Stat. 1947)

"Unless the Department otherwise orders, no public utility shall make any change in any rate now in force or which shall hereafter have been duly established under this Act, except after thirty days' notice to the Department, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The utility shall also give notice of the proposed changes to other interested parties as the Department in its discretion may direct. All proposed changes shall be shown by filing new schedules, or shall be plainly indicated upon schedules filed and in force at the time and kept open to public inspection. The Department, for good cause shown, may allow changes in rates, without requiring the thirty days' notice, under such

conditions as it may prescribe. All such allowed changes shall be immediately indicated upon its schedule by such public utility."

(Sec. 19 of Act 324, 1935; Sec. 73-218, Ark. Stat. 1947)

"The Department, upon complaint, or upon its own motion, shall, upon reasonable notice and after a hearing, have the power to:

(1) Find and fix just, reasonable and sufficient rates to be thereafter observed, and enforced and demanded by any public utility.

(2) Determine the reasonable, safe, adequate, sufficient service to be observed, furnished, enforced or employed by any public utility and to fix the same by its order, rule or regulation.

(3) Ascertain and fix adequate and reasonable standards, classifications, regulations, practices and services to be furnished, imposed, observed and followed by any or all public utilities; ascertain and fix adequate and reasonable standards for the measurements of quantity, quality, pressure, initial voltage, or other conditions pertaining to the supply of all products, commodities, or services furnished or rendered by any and all public utilities; prescribe reasonable regulations for the examination and testing of such production, commodity or service, and for the measurement thereof, establish or approve reasonable rules, regulations, specifications and standards to secure the accuracy of all meters or appliances for measurement; and provide for the examination and testing of any and all appliances used for the measurement of any product, commodity, or service of any public utility.

(4) Ascertain and fix the value of the whole or any part of the property of any public utility, insofar as the same is material to the exercise of the jurisdiction of the Department, and the Department may make revaluations of the whole or any part of said property from time to time and ascertain the value of any new construction, extension, and additions to, or retirements from, the property of every public utility.

(5) Require any or all public utilities to carry a proper and adequate depreciation account in accordance with such rules, regulations and forms of account as the Department may prescribe; ascertain and determine and by order fix the proper and adequate rates of deperciation of the several classes of property of each public utility. Each public utility shall conform its depreciation accounts to the rates so ascertained, determined and fix by the Department.

(6) All powers, duties and authority now conferred upon or vested in the Arkansas Corporation Commission under Act 571 of the General Assembly of the State of Arkansas for the year 1919, as amended by Act 124 of the Acts of the General Assembly of the State of Arkansas of 1921, and by Act 12 of the Acts of the General Assembly of the State of Arkansas of 1933, with respect to the public utilities herein defined, are hereby vested in and imposed on the Department of Public Utilities as herein created, and such powers, duties and authority shall hereafter be exercised and discharged by the Department.

If any of such powers, duties and authority shall be in conflict with any other provisions of this Act the other provisions of this Act shall control."

(Sec. 22(a) of Act 324, 1935; Sec. 73-221, Ark. Stat. 1947)

"The Department, by order, may establish uniform systems of accounts to be kept by any public utility subject to its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and the Department may prescribe the manner in which such accounts shall be kept."

(Sec. 41 of Act 324, 1935; Sec. 73-240 Ark. Stat. 1947)

"No new construction or operation of any equipment or facilities for supplying a public service, or extension thereof, shall be undertaken without first obtaining from the Department a certificate that public convenience and necessity require, or will require, such construction or operation; provided that if such construction or operation has been commenced under a limited or conditional certifi-

cate, or authority as hereinafter provided in Section 43, this Section shall not be construed to require such certificate nor shall such certificate be required for an extension within any municipality or district within which service has heretofore been lawfully supplied, or for an extension within, or to territory then being served, or necessary in the ordinary course."

(Sec. 58 of Act 324, 1935; Sec. 73-254, Ark. Stat. 1947)

"The power of public utilities to issue stock, stock certificates, bonds, notes and other evidences of indebtedness, in case of public utilities incorporated under the laws of this State, and to create liens on property in this state, in case of public utilities incorporated under the laws of any state or foreign country, is a special privilege, the right of supervision, regulation, restriction and control of which is, and shall continue to be, vested in the state, and such power shall be exercised as provided by law and under such rules and regulations as the Department may prescribe."

EXCERPTS FROM THE GENERAL CORPORATION STATUTE OF ARKANSAS, ARKANSAS STATUTES 1947

(Sec. 64-605, Ark. Stat. 1947)

"Dividends—Reserves—Dividends may be paid to stockholders from the corporation's net earnings, or from the surplus of its assets over its liabilities including capital, but not otherwise. When the directors shall so determine dividends may be paid in stock.

Subject to any restrictions contained in its articles of incorporation, the directors of any corporation engaged in the exploitation of wasting assets may determine the annual net profits derived from the exploitation of such wasting assets without taking into consideration the depletion of such assets resulting from lapse of time or from necessary consumption of such assets incidental to their exploitation.

Nothing contained in this section shall prevent the stockholders of any corporation, or the directors thereof if the articles of incorporation shall so provide, from setting apart out of any of the funds of the corporation available for

dividends a reserve or reserves for any proper purpose or from abolishing any such reserve in the manner in which it was created.

A director shall be fully protected in relying in good faith upon the books of account of the corporation or statements prepared by any of its officials as to the value and amount of the assets, liabilities and/or net profits of the corporation, or any other facts pertinent to the existence and amount of surplus or other funds from which dividends might properly be declared and paid. (Acts 1931, No. 255, Sec. 25, p. 795; Pope's Dig., Sec. 2183.)"

(Sec. 64-606, Ark. Stat. 1947)

"Unlawful dividends—Unlawful withdrawals or decreases of capital—Liability of directors—The directors of a corporation shall not make dividends except as provided in Section 25 (Sec. 64-605) hereof, nor shall they divide, withdraw or in any way pay to the stockholders or any of them in any part of the capital of the corporation or decrease its capital except as provided by this act. In case of any wilful or negligent violation of the provisions of this section, the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered upon the minutes of the directors at the time, or, who not being then present shall have filed their written dissent therefrom with the corporation on learning of such action, shall be liable at any time within two (2) years after such violation, to the corporation, or in the event of its dissolution or insolvency, to its creditors, or any of them, to the full amount of the dividends made or of any loss sustained by the corporation by reason of such withdrawal, divisions or decreases of capital. But no action shall be brought hereunder by the creditors of a corporation until judgments for their claims are recovered against the corporation and executions thereon have been returned unsatisfied in whole or in part. (Acts 1931, No. 255, Sec. 26, p. 795; Pope's Dig., Sec. 2184)."

APPENDIX B

Federal Water Power Act of 1935

(Tit. 16—U.S.C. Sec. 824; Sec. 201 of the Act)

"(a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

"(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

"(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

"(d) The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any person for resale.

"(e) The term 'public utility' when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

"(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto."

(Tit. 16—U.S.C. Sec. 824c (a) (f) (Sec. 204 (a), (f) of the Act))

"(a) No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after Aug. 26, 1935.

"(f) The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission."

(Tit. 16—U.S.C. Sec. 825(a) (Sec. 301(a) of the Act))

"(a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of

cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this chapter, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this chapter shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof."

(Tit. 16—U.S.C. 825d (a) (Sec. 305(a) of the Act))

"(a) It shall be unlawful for any officer or director of any public utility to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale by such public utility of any security issued or to be issued by such public utility, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of such public utility from any funds properly included in capital account."

(Tit. 16—U.S.C. Sec. 825L (b) (Sec. 313(b) of the Act))

"(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit

Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

APPENDIX C.

Act Creating Federal Communications Commission

(Tit. 47—U.S.C. Secs. 220(a), (g))

"(a) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this chapter, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.

"(g) After the Commission has prescribed the forms and manner of keeping of accounts, records, and memoranda to be kept by any person as herein provided, it shall be unlawful for such person to keep any other accounts, records, or memoranda than those so prescribed or such as may be approved by the Commission or to keep the accounts in any other manner than that prescribed or approved by the Commission. Notice of alterations by the Commission in the required manner or form of keeping accounts shall be given to such persons by the Commission at least six months before the same are to take effect."

Civil Aeronautics Act

(Tit. 49—U.S.C. Sec. 487(d))

"(d) The Board shall prescribe the forms of any and all accounts, records, and memoranda to be kept by air carriers, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of money, and the length of time such accounts, records, and memoranda shall be preserved; and it shall be unlawful for air carriers to keep any accounts, records, or memoranda other than those prescribed or approved by the Board: *Provided*, That any air carrier may keep additional accounts, records, or memoranda if they do not impair the integrity of the accounts, records, or memoranda prescribed or approved by the Board and do not constitute an undue financial burden on such air carrier."

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 535

ARKANSAS POWER & LIGHT COMPANY AND MIDDLE SOUTH UTILITIES, INC., PETITIONERS

v.

FEDERAL POWER COMMISSION

No. 596

ARKANSAS PUBLIC SERVICE COMMISSION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion, findings and order of the Federal Power Commission (R. 253-299) are reported at 80

P.U.R. (NS) 193. The opinion of the Court of Appeals, as modified on rehearing (R. 2029-2030, 2051), is reported at 185 F. 2d 751.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1950 (R. 2031). Petitions for rehearing, filed on November 24, 1950 (R. 2032, 2039), were denied on December 8, 1950 (R. 2051). The petition for a writ of certiorari in No. 535 was filed on February 6, 1951. The petition for a writ of certiorari in No. 596 was filed on March 8, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and under Section 313(b) of the Federal Power Act.

QUESTION PRESENTED

Whether the accounting authority vested in the Federal Power Commission by Section 301(a) of the Federal Power Act is subordinated, by that Section's proviso, to the accounting authority of a State Commission with the result that the Power Commission is without authority to direct a company which is both a "licensee" and "public utility" under the Act to make accounting adjustments inconsistent with those ordered by the State Commission in its general corporate books of accounts.

STATUTE INVOLVED

The pertinent provisions of Section 301(a) of the Federal Power Act (49 Stat. 838, 854, 16 U.S.C. 825(a)) are set out in the Argument, *infra*, p. 13.

STATEMENT

The Arkansas Power & Light Company (Company), one of the petitioners in No. 535, is concededly both a "licensee" and a "public utility" under the Federal Power Act, subject to the jurisdiction of the Federal Power Commission under the Act (R. 254, 288).[1] It also is subject to regulation by the Arkansas Public Service Commission (State Commission).

Late in 1938, the Power Commission, at the request of the State Commission, agreed to conduct a joint investigation into the Company's reclassification and original cost studies which had been belatedly filed in response to the Power Commission's requirements that all licensees and public utilities subject to its jurisdiction conform their

[1] "Licensee" is a company operating hydroelectric projects pursuant to licenses issued by the Commission under Part I of the Federal Power Act (Section 3(5), 16 U.S.C. 796(5)); "public utility" means a company owning or operating facilities for interstate transmission or sale at wholesale of electric energy as defined in Part II of the Act (Section 201, 16 U.S.C. 824). In addition to the hydroelectric projects owned and operated by it under license from the Commission, the Company is a member of an integrated electric power pooling arrangement operating extensively in the States of Arkansas, Louisiana and Mississippi, under which the generating plants and transmission facilities of the companies are operated for the needs and benefits of all. Under this arrangement ⅓ of the Company's electric energy was received at the Arkansas state boundary from out-of-state while ¼ was delivered to out-of-state utilities so that more than 50% of the energy in the Company's system is transmitted in interstate commerce (R. 254, 288-289). The Company's method of electric energy accounting which indicates that less than 10% of its gross revenue is realized from its wholesale sales, does not reflect the gross amount of energy sold or transmitted in interstate commerce, but only net differences between deliveries and receipts of interstate energy (R. 288-290).

accounts as of January 1, 1937, to its Uniform System of Accounts (R. 255). The resulting report of the Power Commission's staff, generally agreed to by the State Commission's Chief Accountant (R. 99-100), was served upon the Company on June 15, 1943, by an order to show cause why the adjustments proposed therein should not be made (R. 255). After the Company answered on September 18, 1943, the State Commission, without advising the Power Commission, instituted its own proceeding (R. 255).[2] The Power Commission, to avoid interfering with the State Commission's proceeding, postponed its proceeding until the State Commission on June 24, 1944, issued an order fixing the Company's retail rates and directing adjustments in its accounts (R. 255-256).

On September 27, 1944, the Power Commission further directed the Company to show cause why its accounting reclassification should not be adjusted to conform to the recommendations contained in a supplemental staff report (R. 256). In its answer (R. 191-233), the Company moved to dismiss the show cause order on the grounds that its primary, fundamental and dominant books of account were subject to the exclusive jurisdiction of the State Commission and consequently that the Power Commission could not act in accordance with the staff's recommendations since it "would result in an irreconcilable conflict between State

[2] A complete change in the membership of the State Commission occurred between 1938 when that Commission urged joint action, and November 10, 1943, when it proceeded alone.

and Federal regulatory agencies" (R. 193, 256). The hearing which the Power Commission set for the entire matter, including the Company's motion, was deferred pending decision in the suit brought by the Company to enjoin the Power Commission's proceeding and to obtain a declaratory judgment that the State Commission had exclusive regulatory jurisdiction over the Company's basic corporate accounts (R. 256).

Following the dismissal of this suit because of the Company's failure to exhaust its administrative remedies (*Arkansas Power & Light Co.* v. *F. P. C.*, 60 F. Supp. 907 (D.D.C.), reversed, 156 F. 2d 821 (C.A. D.C.), reversed, 330 U.S. 802), hearings were held pursuant to the Power Commission's orders (R. 256-257). The predecessor of Middle South Utilities, Inc., and the State Commission were permitted to intervene (R. 239-248). After briefs were filed and oral argument was had before the Examiner and subsequently before the full Commission (R. 257), the Power Commission, on February 15, 1949, issued the order here involved (R. 287-299). In its order, the Power Commission directed the Company to make the following adjustments in its general corporate books of account (R. 297-298):

(1) To classify $1,033,626.13 in Account 107, Electric Plant Adjustments,[2] and to dispose of that

[2] Account 107 is the account in which write-ups and other improper charges to plant accounts are classified temporarily pending disposition. Federal Power Commission's System of Accounts filed as Item G, p. 19.

amount by an immediate charge to earned surplus or to capital surplus, if properly created (R. 291, 297-298). This amount, the Commission found, was the portion now remaining on the Company's books of a write-up of assets by Electric Bond and Share Co., its corporate parent, for the purpose of supporting a write-up in the securities of predecessor operating companies purchased by Bond and Share and passed from one of its subholding companies to another (R. 259-264).[4]

(2) To classify $5,176,613.91 in Account 100.5, Electric Plant Acquisition Adjustments, and to amortize that amount by equal monthly charges over a period of twelve years to Account 537, Miscellaneous Amortization[5] (R. 298). The Commission found that this was an aggregate of portions of the purchase prices of utility properties paid for the privilege of engaging in the electric utility business with prospects of good profits, and particularly payments to eliminate actual or potential

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[4] The State Commission directed that this item be classified in Account 100.5, Electric Plant Acquisition Adjustments. Under both the Federal and State Commissions' classifications of accounts, the amounts classified in Account 100.5 represent the excess of acquisition cost of properties acquired at arms'-length over the original cost of that property and are subject to such disposition as is appropriate. F.P.C. Uniform System of Accounts, p. 19. Original cost is defined in the Power Commission's classification of accounts (p. 6) as the cost to the person first devoting the property to public service.

[5] Account 537 is an income account as distinguished from accounts in the operating expense section of the income statement, and the amortization prescribed is what is sometimes referred to as "below the line." The State Commission did not require that either this amount or the write-up be amortized or depreciated, but provided that they should remain permanently in the Company's accounts. (R. 1797.)

competition for territory—a capitalization of prospective earning power of uncertain duration and existence, as evidenced by the Company's history of low earnings and nonpayment and arrearages of dividends (R. 265-272, 292-297). The Commission further found that such amortization was in conformity with generally accepted principles of accounting and necessary and appropriate for the purposes of the Federal Power Act (R. 297).

(3) To correct an erroneous charge to the Company's composite depreciation reserve of a loss of $2,366,885 incurred in the sale of its water and ice properties by reversing that charge and instead, charging that amount to earned surplus or a capital surplus created for that purpose (R. 298). Since this sum was the excess of the amount in the reserve for the depreciation of those properties, the Company's charge to depreciation reserve had improperly reduced the remaining part of the reserve allocable to electric plant and thereby inflated the net electric utility plant account.[6]

Following the Commission's denial of their petitions for rehearing (R. 299-324), petitioners sought review of the Commission's order in the Court of Appeals for the District of Columbia Circuit (R. 1-46), which court affirmed the Commission's order (R. 2031). In its opinion, the court rejected petitioners' contention that "because the Company is subject to inconsistent accounting requirements

[6] The State Commission has approved entries charging this loss to the depreciation reserve (R. 272).

of the Arkansas Commission, the Federal Commission's order is invalid" (R. 2030), saying "The law is settled to the contrary. The Federal Power Commission's authority over accounts of its licensees covers basic accounts and does not end where State authority begins. * * * If the State, in the proper performance of its duties, wishes to require the keeping of a separate set of books no doubt it can do so." (R. 2030). Judge Miller dissented (R. 2030).

ARGUMENT

It is expressly conceded in these cases that the Company is subject to accounting regulation by the Power Commission under Section 301(a) of the Act both as a "licensee" under Part I and a "public utility" under Part II. It is also conceded—and we submit properly so[7]—that the adjustments ordered by the Power Commission, considered independently of their inconsistency with the

[7] The propriety of the elimination of intercompany profits in transactions between affiliates, such as those involved in the $1,033,626.13 write-up (*supra*, pp. 5-6) is supported by an unbroken line of decisions. See *e.g. United States* v. *New York Telephone Company*, 326 U.S. 638; *Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U.S. 581, 606-608. So, also, the requirement that the $5,176,613.91 of intangibles be amortized over a period of twelve years (*supra*, pp. 6-7) was clearly proper both under uniform holdings (*American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232; *Pacific Power & Light Co.* v. *F. P. C.*, 141 F. 2d 602 (C.A. 9); *California Oregon Power Co.* v. *F. P. C.*, 150 F. 2d 25 (C.A. 9), certiorari denied, 326 U.S. 781) and the accounting evidence in this record (R. 1308-1317, 1545-1551). Finally the direction that the erroneous charge of the $2,366,885.00 loss in the sale of the water and ice properties to the electric portion of the composite depreciation reserve be corrected (*supra*, p. 7) is in accord with *United States* v. *New York Telephone Company*, *supra*.

order of the State Commission, are not arbitrary or capricious.[8]

Petitioners do claim, however, that because these prescribed adjustments are inconsistent with those of the State Commission, they are arbitrary and capricious.[9] This claim is but another aspect of petitioners' contention, which they have persistently asserted in the earlier proceedings in these cases as well as during the prior litigation with the Commission (see *supra*, p. 5), that by virtue of the proviso in Section 301(a) jurisdiction to regulate the Company's general corporate books of account, with certain conceded exceptions, is vested exclusively in the State Commission, (Pet. in No. 535, pp. 12, 15; Pet. in No. 596, pp. 21-22). Based on this claim, petitioners assert that the Power Commission's requirements that the accounting entries which it ordered be made in the

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[8] In *Northwestern Electric Co.* v. *F. P. C.*, 321 U.S. 119, this Court, in affirming similar accounting adjustments directed by the Power Commission, stated, "It is not for us to determine what is the better [accounting] practice so long as the Commission has not plainly adopted an obviously arbitrary plan." (321 U.S. at 124). See also R. 2030; *Pennsylvania Power & Light Co.* v. *F. P. C.*, 139 F. 2d 445 (C.A. 3), certiorari denied, 321 U.S. 798; *Pacific Power & Light Co.* v. *F. P. C.*, 141 F. 2d 602 (C.A. 9); *California Oregon Power Co.* v. *F. P. C.*, 150 F. 2d 25 (C.A. 9); certiorari denied, 326 U.S. 781.

[9] Thus petitioners assert, citing *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, that since the State Commission permitted the Company to retain in its books the amounts directed by the Power Commission to be written off, these amounts constituted "true increment[s] of value" and not "fictitious or paper increment[s]," subject to write off (Pet. in No. 535, pp. 13-14; Pet. in No. 596, pp. 10, 19-21).

Company's corporate books of account has created an irreconcilable conflict with the inconsistent requirements of the State Commission, and urge review by this Court to resolve this conflict.

1. Assuming for the moment that a conflict does exist as claimed by petitioners, the Commission, we submit, properly resolved it by holding "[i]f it is necessary to determine that [its accounting regulation] or [that prescribed by the State Commission] is paramount, it must be that prescribed by Federal authority" (R. 286).

Petitioners, in attacking this conclusion, claim that the Power Commission's accounting regulation is subordinate to that of the State Commission with the limited exception of licensed project accounts; the Company seems to broaden the exception to include also accounts reflecting facilities used exclusively for interstate transmission and wholesale sale of energy.[10] But this claim ignores the fact that Congress intended by Section 301(a)

[10] Petitioners have at different stages of these proceedings varied their positions as to the extent of the asserted subordination. Before the Federal Commission, petitioners urged that the supremacy of the State Commission's requirements extended to all of the Company's accounts including its "licensee" accounts. In the court below, the Company conceded that the State requirements were not paramount as to licensee accounts and those relating to facilities used exclusively in the interstate transmission and wholesale sale of energy, a concession which the Company appears to withdraw in its petition to this Court but which it suggests as a basis for integrating the accounting authorities of the two Commissions (Pet. in No. 535, p. 12). The State Commission, on the other hand, conceded in the court below that its accounting regulation was not paramount as to licensed project accounts, and has continued that concession in this Court (Pet. in No. 596, pp. 5, 14, 24).

to provide a nationwide uniform system of accounts in order to combat financial manipulation and exploitation in the public utility industry, which had been implemented by the prevalent accounting practice and which, the Federal Trade Commission's investigation revealed, had flourished in spite of state regulation. S. Doc. No. 92, Part 73-A, 70th Cong., 1st Sess., p. 93; Hearings before Senate Committee on Interstate Commerce, on S. 1725, 74th Cong., 1st sess., p. 13.[11] In addition, this claim overlooks the uniform holdings of both this Court and lower courts, based on this clear Congressional intention, as to the complete and plenary nature of accounting jurisdiction vested in the Power Commission,[12] which has been described as "summary and unlimited" (*Alabama Power Co.* v.

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[11] See, also, S. Rep. No. 621, 74th Cong., 1st sess., pp. 17-18, 53; H. Rep. No. 1318, 74th Cong., 1st sess., pp. 7-8, 30-31; 79 Cong. Rec. 10378-79, 10383-84, 10359, 10574-75; Hearings before the House Committee on Interstate and Foreign Commerce, on H.R. 5423, 74th Cong., 1st sess., pp. 2170-2171. Indeed, the Trade Commission in its public utility investigation, which led to the enactment of the Federal Power Act, found substantial inflation in the accounts of this very Company. S. Doc. 92, Part 42, 70th Cong., 1st sess., pp. 173-178, 727-731.

[12] *Northwestern Electric Co.* v. *F. P. C.*, 134 F. 2d 740 (C.A. 9), affirmed, 321 U.S. 119; *Jersey Central Power & Light Co.* v. *F. P. C.*, 319 U.S. 61, 73, n. 12; *F. P. C.* v. *East Ohio Gas Co.*, 338 U.S. 464; *Pacific Power & Light Co.* v. *F. P. C.*, 141 F. 2d 602 (C.A. 9); *Pennsylvania Power & Light Co.* v. *F. P. C.*, 139 F. 2d 445 (C.A. 3); *Hartford Electric Light Co.* v. *F. P. C.*, 131 F. 2d 953, 963, n. 20 (C.A. 2), certiorari denied, 319 U.S. 741; *Northern States Power Co.* v. *F. P. C.*, 118 F. 2d 141 (C.A. 7). The Company's effort to distinguish several of these cases on the ground that they relate only to costs of licensed projects (Pet. in No. 535, pp. 17-18) overlooks the fact that the Federal Commission's

F. P. C., 128 F. 2d 280, 285-286 (C.A. D.C.), certiorari denied, 317 U.S. 652), "unlimited" (*Northwestern Electric Co.* v. *F. P. C.*, 125 F. 2d 882, 886 (C.A. 9)), and "comprehensive" (*California Oregon Power Co.* v. *F. P. C.*, 150 F. 2d 25, 27 (C.A. 9), certiorari denied, 326 U.S. 781). This clear legislative history, taken together with the decisions expressly affirming the existence and purpose of such comprehensive accounting jurisdiction in the Power Commission, not only negate petitioners' claim in its broadest aspect, but make it plain that there is no basis for subordinating the Power Commission's authority over companies which are subject to its regulation to that of the state commissions even in part."

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only accounting authority over licensees and public utilities is that conferred by Section 301(a) of the Act. No distinction is made either in that Section or elsewhere in the Act between the authority of the Commission over accounts of licensees and its authority over those of public utilities. As the Senate Committee stated, in reporting on Section 301(a) in its present form: "This authority of the Commission over the accounts of companies subject to its jurisdiction extends to the entire business of such companies * * *" S. Rep. No. 621, 74th Cong., 1st sess., p. 53.

[11] Petitioners' claim in its limited formulation, is not aided by the language in the last clause of Section 301(a) of the Act to the effect that "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States" (Pet. in No. 535, p. 9). This limitation, this Court has held, applies to the determination of what companies are subjected to federal regulation and "is directed at generation, transmission and sale rather than the corporate financial arrangements of the utilities engaged in such production and distribution." *Jersey Central Power & Light Co.* v. *F. P. C.*, 319 U.S. 61, 74. See, also, *Connecticut Co.* v. *F. P. C.*, 324 U.S. 515, 525; *F. P. C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 476; *Northwestern Electric Co.* v. *F. P. C.*, 125 F. 2d 882, 885 (C.A. 9); *Hartford Electric Light Co.* v. *F. P. C.*, 131 F. 2d 953, 964 (C.A. 2), certiorari denied, 319 U.S. 741.

Moreover, petitioners' claim is based on a distorted reading of the proviso in Section 301(a) of the Federal Power Act which provides:

> Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. * * *

The proviso plainly does not subordinate the Power Commission's accounting authority to that of the state commissions. In addition to being phrased in terms much narrower and less detailed than the affirmative grant to the Power Commission, the proviso, on its face, merely operates to prevent a public utility from refusing to keep accounts ordered by the state commission on the pretext that such accounts are precluded by the

Act.[14] Since, as the Commission recognized (R. 284), this proviso leaves the way open for the state commissions to require the utility to keep any accounts needed for state regulatory purposes, there clearly is no basis for the contention that the Power Commission's order "will result in serious impairment of substantive regulatory functions of the State Commission" (Pet. in No. 596, p. 17, see also pp. 10, 11, 17-18, 23; Pet. in No. 535, p. 13). *Alabama Power Co.* v. *F. P. C.*, 128 F. 2d 280, 285-286 (C.A. D.C.), certiorari denied, 317 U.S. 652; *Hartford Electric Light Co.* v. *F. P. C.*, 131 F. 2d 953, 964 (C.A. 2), certiorari denied, 319 U.S. 741; cf. *Northwestern Electric Co.* v. *F. P. C.*, 321 U.S. 119, 124-125; *F. P. C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 476.

That the purpose of the proviso was so limited is clear from its legislative history. The proviso was sponsored by the National Association of Railroad and Utilities Commissioners (Hearings before the House Committee on Interstate and For-

[14] When Congress intended to subordinate the Federal Commission's authority to that of the State, it had no difficulty in clearly manifesting its intention. Thus, Section 204(f) of the Act, 16 U.S.C. 824c (f), which relates to the jurisdiction of the Commission over certain security issues of public utilities, reads:

> The provisions of this section shall not extend to a public utility organized and operated in a State under the laws of which its security issues are regulated by a State Commission.

And Section 19 of the Act, 16 U.S.C. 812, provides, as to certain matters affecting licensees, that the Federal Commission's jurisdiction "shall cease and determine * * * as soon as the State shall have provided a commission or other authority for the regulation and control of" these matters.

eign Commerce on H.R. 5423, 74th Cong., 1st Sess., p. 1666) because, as stated by its Solicitor, the Association construed the Section "as it now stands" (*i.e.*, without the proviso) as forbidding "public utilities to keep any accounts except those prescribed by the Federal Commission * * * We seek to have that modified so that it will not prevent them from keeping such accounts as the State commissions may require for State commission purposes" (*ibid.* 1689). And in connection with the Association's identical proposal as to Section 15(e) of Title I, Mr. Benton, the Solicitor, further explained (Hearings before the Senate Committee on Interstate Commerce, on S. 1725, 74th Cong., 1st sess., p. 784):

> Mr. Benton. I invite your attention to the fact that we are not asking that any part of the authority which the bill as it stands would give be stricken out.
>
> The Chairman. I understand that.
>
> Mr. Benton. We are merely asking that that shall not be taken to disable a State commission from requiring some *additional* information. [Emphasis supplied.] [15]

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[15] Again, as to a proposed proviso to Section 302, which was substantially similar to that in Section 301(a), Mr. Benton stated that its purpose was to enable State commissions to determine facts needed for rate-making purposes and that the Association was "not desirous that the Federal Commission shall be in any way limited in its power." (Senate Hearings, *supra*, p. 792). See also, Benton, *Jurisdiction of the Federal Power Commission and of State Agencies in the Regulation of the Electric Power and Natural Gas Industries*, 14 Geo. Wash. L. Rev., 53, 73-74.

Furthermore, the Act's legislative history reveals several unsuccessful efforts to incorporate into the proposed legislation language expressly subordinating the Power Commission's accounting authority to that of the states. For example, during the House debates, Representative Woodrum [16] offered an amendment, which would have exempted companies subject to State commission accounting requirements from those of the Federal Commission. This amendment provided (79 Cong. Rec. 10574):

> If, with respect to * * * the method of keeping accounts * * *, any person is subject to the law of any State or regulation by a State commission, such person shall not be subject to the requirements of this part of the next preceding part, or of any rule, regulation, or order thereunder with respect to the same subject matter.

The Woodrum amendment was adopted over the strenuous objections of Representatives Lea and Cole,[17] members of the House Committee on

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[16] Mr. Woodrum was not a member of the House Committee which considered and reported the bill to the House.

[17] "Mr. Lea. * * * [The proposed amendment] would largely destroy the usefulness of the Federal regulation this bill gives to the Federal Power Commission. We cannot have effective regulation unless we give that Commission the power to get information and give it control over accounts and valuations. The amendment offered by the gentleman from Virginia [Mr. Woodrum] would destroy effective control over the accounts and over depreciation accounts in particular of these utility companies. It would compel the Federal Government to accept State valuations, made in some instances without adequate information and sometimes in total disregard of the

Interstate and Foreign Commerce and of the subcommittee dealing with Title II, who pointed out, among other things, that the very same amendment had already been offered, fully considered and rejected in the subcommittee and committee. 79 Cong. Rec. 10574-10575. However, partly because of the Federal Commission's opposition to the amendment, the bill was sent to conference (79 Cong. Rec. 10838-10839), where the amendment was eliminated. H. Rep. No. 1903, 74th Cong., 1st sess., p. 75; see, also, 79 Cong. Rec. 8859, H. Rep. No. 1318, 74th Cong., 1st sess. The fact that the proviso was already a part of Section 301(a) at the time when this amendment was proposed, taken together with its ultimate rejection, demonstrates that Congress intended not only that Sec-

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rights of the people of other States whose interests, rates, investors, and consumers are involved.

"One of the main difficulties in regulatory control from which we have suffered in the last few years has been lack of an accounting system that was faithful to the facts. * * * This committee has been more than kind to the State commissions in the provisions of this bill.

* * * * *

"Mr. Cole. * * * Is it not also true that, aside from requiring a uniform accounting and depreciation system by public utilities subject to this bill, every right of the States had been fully protected by this bill?

"Mr. Lea. That is true. * * *

"We have quite a variety of laws and regulations in the States, some good, some bad, some utterly indifferent, some applying to certain subjects and not to others. So if we adopt the amendment offered by the gentleman from Virginia, the effect will be that for the purposes of Federal regulation we will adopt the poorest standards in the United States for valuation, for instance, for control of accounts, and for reports on which the commission must depend as a basis for its action." (79 Cong. Rec. 10574-10575).

tion 301(a)'s proviso should not be given the reading urged by petitioners, but also that the Power Commission's accounting authority should not be subordinated to that of the State commissions. Cf. *Northwestern Electric Co.* v. *F. P. C.*, 321 U.S. 119, 125.

2. We have assumed above that an irreconcilable conflict existed between the accounting requirements of the Power and State Commissions. However, as pointed out by the Power Commission in its opinion, "the problem of conflict [between the inconsistent State Commission and Federal accounting requirements] is not as great as [petitioners have] conjured up" (R. 286). The mechanics of bookkeeping present no major problem; "the area of possible conflict involves a half-dozen accounts or so" and "through the use of subaccounts or alternative accounts the mechanical bookkeeping problem can be solved without any real difficulty and with inconsequential expense" (R. 284). Nor do the inconsistent requirements of the Commissions create an irreconcilable, or even an unusual conflict, as to the financial reports—reports to stockholders, security exchanges, creditors, etc.—which the Company regularly makes. This problem is commonly encountered by corporations which engage in business in more than one state, and which, accordingly, must observe the applicable laws of all the states in which it does business. *State Farm Mutual Automobile Insurance Co.* v. *Duel*, 324 U.S. 154; *International Ticket*

Scale Corp. v. *United States*, 165 F. 2d 358 (C.A. 2); *German-American Coffee Company* v. *Diehl*, 216 N.Y. 57. Just as in that situation the multi-state corporation can meet all applicable requirements by complying with the most conservative or stringent, so here the alleged conflict can easily be resolved by the Company's basing its financial reports upon the more conservative of the requirements imposed upon it. In these circumstances, the requirements of the State and Federal Commission do not present, we submit, such an irreconcilable conflict as to merit resolution by this Court.[18]

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[18] The contentions in No. 535 as to rights of Middle South Utilities, Inc. to dividends as common stockholder in the Company and its alleged deprivation of property in contravention of the Fifth Amendment (Pet. in No. 535, pp. 14-15) are without substance. *Northwestern Electric Co.* v. *F. P. C.*, 321 U.S. 119, 124; *American Power & Light Co.* v. *S. E. C.*, 158 F. 2d 771, 785 (C.A. 1), certiorari denied, 331 U.S. 827. Even if "the enforcement of the accounting system does require [Middle South Utilities] to forego [its] current dividends, we do not concede that this amounts to an unlawful taking of [its] property." *Kansas City Southern Ry. Co.* v. *United States*, 231 U.S. 423, 453; see also *Norfolk and Western Ry. Co.* v. *United States*, 287 U.S. 134, 141.

CONCLUSION

It is respectfully submitted that the petitions for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
NEWELL A. CLAPP,
Acting Assistant Attorney General.
PAUL A. SWEENEY,
MELVIN RICHTER,
Attorneys.

BRADFORD ROSS,
General Counsel.
HOWARD E. WAHRENBROCK,
Assistant General Counsel.
REUBEN GOLDBERG,
Attorney,
Federal Power Commission.

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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 535.

ARKANSAS POWER & LIGHT COMPANY,

AND

MIDDLE SOUTH UTILITIES, INC.,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION.

Questions Presented.

At page 2 of its Brief in Opposition, the government states the "Question Presented" as follows:

> "Whether the accounting authority vested in the Federal Power Commission by Section 301(a) of the Federal Power Act is subordinated, *by that Section's proviso,* to the accounting authority of a State Commission *with the result that the Power Commission is without authority* to direct a company which is both a 'licensee' and 'public utility' under the Act to make accounting adjustments *inconsis-*

test with those ordered by the State Commission in its general corporate books of accounts." (Emphasis supplied).

Petitioners submit that this statement is an oversimplification of the questions raised, is misleading and does not properly reflect the precise issues involved in this case.[1]

Contrary to the implication in the government's statement of the "Question Presented", Petitioners do not rely solely on the proviso clause of Section 301(a) to support their contention that Congress did not, in that section or elsewhere, confer upon the Federal Commission dominant accounting jurisdiction over basic corporate accounts in the circumstances here presented. Nor does this case involve any issue as to whether the Federal Commission is "without authority" to make accounting adjustments "inconsistent" with those of a State Commission in such accounts. First, as the Brief of the government later recognizes, Petitioners have conceded the Federal Commission's dominant accounting jurisdiction as to licensed projects and as to facilities used exclusively in the interstate transmission and wholesale sale of energy. Secondly, the record in this case demonstrates beyond doubt that the conflict between the two commissions involves *mutually exclusive* accounting determinations (rather than merely "inconsistent" accounting adjustments), for the reason that the Arkansas Power & Light Company can have only one set of basic corporate accounts.

Finally, the government's Brief is misleading in that its argument has the effect of avoiding the issue of whether

[1] Petitioners respectfully suggest that a comparison of pages 6 to 8, inclusive, of the Petition of the Companies (No. 535) and of pages 7 to 9, inclusive, of the Petition of the State Commission (No. 596) with the language used in the government Brief will disclose that the government paints with an unreasonably broad brush.

the order of the Federal Commission, regardless of authority conferred upon it by Section 301(a), is, in the circumstances here present, nevertheless arbitrary, unreasonable and, therefore, void.[2] The danger here is, of course, that the Court may be erroneously led to conclude that no such issue is involved in this case. But the fact is that, wholly independent of the question as to what authority has been conferred upon the Federal Commission by Section 301(a), we are here concerned with the question whether, assuming that the Federal accounting jurisdiction *is* paramount, the exercise of it by the Federal Commission in this case is void.

It is not that the state has "permitted" the Company to retain certain "intangibles" in its accounts; instead, the question is whether a valid cost found by the state to be an inseparable part of actual, prudent investment made for local service may be treated by the Federal Commission as having no value because of that Commission's assumption that the state must alter its judgment to accord with the Federal Commission's ideology.

The questions presented by Petitioners have not been answered in other cases (Petitioners' Brief, pp. 16-18). The Federal Commission has never before had a case similar to this one (R. 1427).

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[2] Thus, at page 9 of its Brief in Opposition, the government refers to the contention of Petitioners that the Federal Power Commission Order is arbitrary and capricious and attempts to dispose of this very real issue by characterizing it as "but another aspect of petitioners' contention, * * * that by virtue of the proviso in Section 301(a) jurisdiction to regulate the Company's general corporate books of account, with certain conceded exceptions, is vested exclusively in the State Commission." Again, at page 10, the government refers to the holding of the Federal Commission that its accounting jurisdiction is paramount and purports to summarize the position of Petitioners in the following language: "Petitioners, in attacking this conclusion, claim that the Power Commission's accounting regulation is subordinate to that of the State Commission with the limited exception of licensed project accounts * * *"

Legislative History.

The legislative history both of the 1935 Act and of Section 301(a) itself is exceedingly voluminous, but the government has included in its Brief in Opposition only short quotations from Mr. Benton and a brief discussion of the Woodrum amendment. By its selection of material, the Federal Commission omits reference to the overwhelming evidence that Congress intended to preserve local authority and that the 1935 legislation was designed to assist and supplement state regulation.[3] Furthermore, careful analysis of the legislative materials will show that the testimony of Mr. Benton and the history of the Woodrum amendment do not support the arguments for which they are advanced in the government Brief in Opposition.

At pages 15 and 16 of its Brief, the government quotes the testimony of Mr. Benton to show that it was the intention of Congress in Section 301(a) to confer paramount accounting jurisdiction on the Federal Commission and that the purpose of the proviso clause was merely to permit the states to require companies to keep additional accounts for state commission purposes.

The government first quotes language of Mr. Benton to the effect that Section 301(a), without the proviso clause, prohibited public utilities from keeping any accounts whatsoever except those prescribed by the Federal Commission, the implication being that the proviso was for a restricted purpose and did not change the claimed grant of overriding federal power. But at the time Mr. Benton so testified, the accounting provision, in its then form, gave the

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[3] See *Connecticut Light & Power Co.* v. *F. P. C.*, 324 U. S. 515, 525-527 (1945).

Federal Commission control over "any and all accounts."[4] Subsequently, this all-inclusive phrase was eliminated and there were added the proviso clause and language restricting the Federal Commission's accounting jurisdiction to that "necessary or appropriate" to carry out its duties under the Act. Mr. Benton at no time construed Section 301(a) *as so revised*, as conferring upon the Federal Commission paramount accounting authority. The further quotation from Mr. Benton to the effect that he desired the section modified to give the states such accounting jurisdiction "as they may require for state commission purposes" is perfectly consistent with Petitioners' construction of Section 301(a).

Finally, the language of Mr. Benton quoted at the bottom of page 15 of the Brief in Opposition was directed to the accounting sections of *Title I* of the 1935 Act, *having to do only with the accounting regulation under the holding company act.* Sections 15(e) and 20 of Title I required that federal accounting regulation be not inconsistent with the state law but permitted the government to require additional information. Mr. Benton in the quoted testimony was directing his attention to a statement by Senator Wheeler that, as the accounting provisions of Title I stood, the bill permitted the government to require additonal information so long as it was not inconsistent with state law (Senate Committee Hearings, p. 784). Consistent with his efforts to preserve state authority, Mr. Benton requested that the states *also* have the power of securing additional information.

The length of the legislative history of the Federal Power Act precludes adequate summarization in the concise briefs now before the Court. The quotation from

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[4] Hearings before Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess. (1935) 44.

the Woodrum amendment appearing on page 16 of the Brief in Opposition is elliptical; this amendment *did not* relate solely or even primarily to accounts. It related also to securities, reports, valuations, acquisitions and other matters and, as explained by the managers of the House conferees, "excluded Federal regulation of any matter as to which there is authority in a State Commission" (H. R. Rep. No. 1903, 74th Cong., 1st Sess. 75). Rejection of an amendment which, as stated by Senator Wheeler (79 Cong. Rec. 8399) "is so broadly drawn that as a matter of fact it would completely exempt practically all the subsidiary or holding companies in some States," does not support Respondent's present claims.

A Conflict Exists and Must Be Reconciled.

Respondent asserts (p. 18) that no irreconcilable conflict exists between the two commissions. This is rested upon the glib asumption that reconciliation is effected by bowing to the Federal Commission. Whether the accounts affected are few or many in number is immaterial if they include the all-important summary accounts of net income, surplus and net worth. Again, the inconsistent requirements are assumed to be reconcilable by complying with the Federal Commission's requirements. Misrepresentations of financial condition in statements to stockholders and the general public (here amounting to millions of dollars) are not justified or made "usual" by such cases as are cited at pages 18 and 19. No values were destroyed in any of the cases cited. In none did one authority seek either to distort accounts or to impose its authority upon the other. They relate instead to conditions imposed on foreign corporations doing business within a state and support the claim that local business should be regulated

locally. Neither these cases nor the cases cited in footnote 18 excuse arbitrary action by one authority which has the effect of reviewing, reversing and revising the valid determinations of the other authority.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

P. A. Lasley,
Counsel for Petitioner, Arkansas Power & Light Company,

A. J. G. Priest,
Sidman I. Barber,
Bernal Seamster,
Harry A. Poth, Jr.
Counsel for both Petitioners.

Gordon E. Young,
Of Counsel.